

EUROPEAN UNIVERSITY INSTITUTE
Department of Law

**ARTICLE 81:
PUTTING PUBLIC POLICY
IN ITS PLACE**

Thesis submitted by
Christopher Townley

For assessment with a view to obtaining the title of Doctor of Laws
of the European University Institute

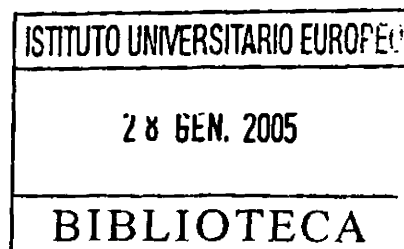
Florence, December 2004



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Florence, December 2004

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LIST OF ABBREVIATIONS

CFI	Court of First Instance
CMLRev.	Common Market Law Review
Community	European Community
Community Courts	The CFI and ECJ
ECJ	European Court of Justice
ECLR	European Competition Law Review
EEA	European Economic Area
EU	European Union
NYU Law Review	New York University Law Review
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading, UK
OUP	Oxford University Press
SEA	Single European Act
SME	Small or medium-sized enterprise
Treaty	The Treaty establishing the European Community
U. Pa. L. Rev.	University of Pennsylvania Law Review
USA	United States of America
USD	United States Dollars

Other abbreviations have been used, but they are either defined in the text, or can be found in the Bibliography.

THESIS INTRODUCTION

This thesis discusses public policy's place in article 81 of the Treaty.¹ It demonstrates that public policy considerations are relevant within that provision. It also suggests how and where they should be considered there.² Bork has said that:

"Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law - what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."³

Bork's first point is that we must consider whether, in article 81 cases, the Community decision-maker should be guided 'by one value or by several' goals.

An OECD report on the design and implementation of competition law and policy refers to two ends of the spectrum in the debate about competition policy's objectives.⁴ At one end is the view that the sole purpose of competition policy is to maximise economic efficiency. This approach leaves no room for socio-political criteria, such as fairness and equity, in the administration of competition policy. The opposite view is that competition policy is based on multiple values that are neither easily quantifiable nor reduced to a single economic objective. These values reflect society's wishes, culture, history, institutions and perception of itself, which cannot and should not be ignored in competition law enforcement.

Hovenkamp is a vocal exponent at the first end of this spectrum. He has, somewhat controversially, said that no one in the mainstream United States debate:

"...would any longer assert that consumer welfare should not be the central or even exclusive goal of antitrust, or that antitrust should be concerned about unemployment, inflation or other macroeconomic issues."⁵

Many competition lawyers say the same of Community competition policy.⁶ So, it seems, does the Commission. In 2004 it said that:

¹ Article 81 of the Treaty is the Community equivalent of section 1 of the Sherman Act 1890 in the USA.

² That is not to say that this thesis is of no interest to those involved outwith article 81 of the Treaty. Community competition policy forms a whole, the different provisions pursue the same aims, see, for example, *Case 6/72 Europemballage and Continental Can v. Commission* [1973], paragraph 25. Therefore, many of my conclusions are equally applicable to article 82 and merger analysis too. Furthermore, my demonstration of how and why the Treaty should be interpreted as a systematic whole will also interest readers outside of the competition law world. In this sense, it might be viewed as a bridge between competition lawyers and other Community specialists.

³ Bork (1978), page 50. In the interests of space, abbreviated references to books, journals, cases and other documents are given in the footnotes. Full references to all documents cited can be found in the Bibliography.

⁴ The World Bank and OECD (1999), pages 1 and 2.

⁵ Ehlermann (1998), page 13.

⁶ See, for example, Ehlermann (2001), pages 302, 303 and 359 and Amato (1997), page 116.

"The objective of article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."⁷

There is a growing tendency among Community competition specialists to treat their topic in a highly technical way, as distinct from Community law as a whole.⁸ The theoretical foundations for such views are rarely expressed. However, some theoretical insight might be gained from the recent reflections of Lowe on the European Convention:

"The Draft Treaty is generally positive as far as competition policy is concerned. I would highlight, in particular, the fact that 'a single market where competition is free and undistorted' figures amongst the objectives of the EU, that the legislative power to establish the competition rules necessary for the functioning of the internal market shall remain in the EU's exclusive competence and that the substantive rules of the EC Treaty on antitrust and State aid have been taken over without changes."⁹

Lowe focuses on the (unchanged) wording of article III-161 (article 81 of the Treaty, as it is currently known), as well as the continued reference to 'an internal market where competition is free and undistorted', article I-3(2). He only sees an isolated competition policy provision, pursuing a single aim. Competition as an end in itself.

One might question whether 'isolationism' is the right approach. Some argue that, as the law now stands, the competition rules contained in the Treaty are part of a wider system and must be interpreted in this context. Take Slynn for instance:

"The task of the European Court is to ensure that in the interpretation and application of the EEC Treaty the law is observed. In construing particular articles of the Treaty it is hardly surprising that the Court should have regard to the framework of the Treaty as a whole, to its general principles, to the tasks and activities which the Treaty prescribes for the Community."¹⁰

More particularly, in relation to Community competition policy, van Miert has said:

"Competition policy has so long been a central Community policy that it is often forgotten that it is not an end in itself but rather one of the instruments towards the fundamental goals laid out in the Treaty - namely the establishment of a common market, the approximation of economic policy, the promotion of harmonious development and economic expansion, the increase of living standards and the bringing about of closer relationship between Member States. Competition therefore cannot be understood or applied without reference to this legal, economic, political and social context."¹¹

⁷ Commission, *Article 81(3) Guidelines*, paragraph 13.

⁸ Baquero Cruz (2002), page 1. This tendency is often reinforced by political scientists and specialists in other Community law disciplines who tend to ignore Community competition policy, Wesseling (1999a), pages 6 and 7.

⁹ Lowe (2004), page 3. Mr Lowe is the Commission's Director General of Competition.

¹⁰ Slynn (1985), page 393.

¹¹ van Miert (1993), page 120.

This dispute, between the 'isolationists' and those that read the Treaty as a system, goes to the very heart of Treaty interpretation. It affects everything, from the substantive interpretation of individual provisions to the facility with which the Treaty can be applied, procedurally. Its resolution is vital for determining whether, in article 81 cases, the Community decision-maker should be guided 'by one value or by several' goals.

Part A of the thesis discusses the consideration of non-economic objectives¹² in antitrust. Chapter One asks why public policy objectives might be incorporated within a competition policy; and, when this might be appropriate. This analysis is not restricted by legal constraints. It serves as a theoretical starting point for our discussion. Useful as this approach is for establishing *why* one outcome might be more preferable to another, in theory, it is less helpful for helping us predict what the outcome *ought* to be in a specific legal context. Context is important. As Shenefield, somewhat pessimistically says:

"...a goal of perfect convergence [in global competition policy]...is an illusion. It can never happen; and even if it could happen, it would in all probability be a bad thing. There are too many variations of country and culture to permit a uniform formulation of the law of competition to be successful everywhere and for all times."¹³

One might agree or disagree with his views on the feasibility of international antitrust rules; but, it is hard to dispute that law (and more importantly legal interpretation) is founded in country and culture. They cannot be separated in practice. Slynne and van Miert both agree that article 81 must be interpreted in its Treaty context. Chapter Two explains and justifies this position, which is dominant among general Community lawyers. As a result, Part A concludes that, contrary to the Commission's statements cited above:

"In the vast majority of cases, including those related to article 81, they [the Community Courts] have chosen to compromise, i.e. to encourage the balancing of different policy objectives within specific articles. This is because they view competition policy not as an end in itself, but as an instrument in a wider system for achieving the Treaty's fundamental goals. The Community Courts interpret article 81 broadly and many public interest issues can now be considered within it."

A comparison can be made with Bork's interpretation of US antitrust. He concludes that the legislature intended the *Sherman Act* to solely pursue welfare¹⁴ objectives. Despite this fact, the US courts have read many other objectives into it.¹⁵ In the Community, we have, in many ways,

¹² In this thesis, 'non-economic objectives' refers to all public policy objectives, with the exception of economic efficiency. Furthermore, 'non-economic objectives', 'political considerations', 'non-economic values', 'non-welfare aims', 'non-efficiency goals' and 'public policy objectives', and any combination of the above, are treated as synonyms.

¹³ Shenefield (2004), pages 388 and 389. See also Ehlermann (1998), page 484.

¹⁴ In this thesis 'welfare' and 'surplus' are used as synonyms for 'economic efficiency'.

¹⁵ Bork (1993), page 418.

the opposite position. The Member States, through the structure of the Treaty and the addition of certain policy-linking clauses, have created a system based on multiple values. These values reflect society's wishes, culture and history. It is not the intention that they be ignored in Community competition law enforcement. Despite this, we have seen the Commission claim that article 81 can be reduced to a single economic objective.

So, theoretically, Community competition policy, particularly article 81 of the Treaty, could be interpreted in different ways. One way is to focus on just one goal, for example, economic efficiency. At the other extreme, many other relevant objectives can be considered there. We suggested that the latter method better reflects the Community legal order.

One might (cynically) ask whether this debate makes any substantive difference. In fact, it does. The inclusion of non-economic objectives in article 81 cases can significantly complicate decision-making. It can also fundamentally alter the final outcome. This is important, as it affects the agreement's status under article 81(2) of the Treaty. For these reasons alone, the debate is vital. However, there are additional reasons why answers are more keenly sought today:

- Regulation 1/2003 abolishes the notification regime.¹⁶ As a result, the parties to an agreement¹⁷ can no longer gain immunity from fines.¹⁸ More importantly, this lack of guidance reduces the certainty about the agreement's status under article 81(2) of the Treaty, which increases the litigation risk;
- Regulation 1/2003 decentralises article 81 enforcement. The Commission can still take article 81 decisions. However, in addition, the whole of article 81 is now directly enforceable in the Member States' courts and competition authorities. A plethora of new bodies can now apply a provision, article 81(3) of the Treaty, that they have never used before. Unless it is clear which objectives are relevant in their decisions and how to balance them, there is a risk of inconsistency and even 'wrong' decisions;
- Another important reason for studying the issue now is that the new Commissioner for competition was appointed in November 2004. The Commissioner for Competition can

¹⁶ Commission, *Guidance Letters Guidelines*, still allows the parties to seek informal guidance from the Commission on novel questions, however, this will not often apply, articles 7-10.

¹⁷ For the purposes of this thesis I only refer to "agreements" but, where the context allows, I also include, by implication, "decisions by associations of undertakings and concerted practices". Also, I only refer to "restriction of competition". This expression usually includes "prevention, restriction or distortion of competition".

¹⁸ Something they effectively had once their agreement had been notified. Commission, *Guidance Letters Guidelines*, article 4, emphasises the Commission practice of only imposing more than symbolic fines when "...it is established, either in horizontal instruments or in the caselaw that a certain behaviour constitutes an infringement."

dramatically affect, in a day to day way, the consideration of non-economic objectives by the Commission (and thus by other relevant decision-makers);¹⁹ and,

- Article 81 has often been used as a tool for achieving Treaty objectives, such as market integration,²⁰ to bypass blockages in the legislative process.²¹ The recent enlargement of the Community and its impact on decision-making effectiveness may mean that more reliance is again placed on this objective, and others, in article 81.

This leads us to Bork's second question. If the antitrust judge is to be guided by several values, how is he (or she) to decide cases where conflicts arise between different values? The Commission recognises these problems and has produced a series of guidelines to clarify how decentralisation will work. In particular, Commission, *Article 81(3) Guidelines*, set out its view of the substantive assessment criteria for the application of article 81 as a whole, and article 81(3) of the Treaty in particular.²² As Monti says:

"...one of the major goals of our reforms is to guarantee that, after 1st May 2004, companies benefit from a high degree of legal certainty as to what is allowed and what is not under the competition rules."²³

These guidelines are generally helpful. However, they say nothing of the consideration of non-economic objectives within article 81, except that they are relevant, insofar as they can be subsumed within article 81(3)'s four conditions.²⁴ This bare statement is confusing because:

- it does not reflect the Commission's recent policy statements, see above;
- it does not take into account recent Community Court decisions, such as the *Wouters Case*; and,
- it may contradict the normal approach to Treaty interpretation, explained above by Slynn.

An interesting legal point, but is it of any real importance? Surely the consideration of non-economic objectives within article 81 does not arise very often? Such is the predominant view;²⁵ it is also in line with worldwide antitrust developments.²⁶

¹⁹ McGowan and Wilks (1995), pages 160-162. This effect could have less impact now, due to decentralisation, but the Commission still has considerable authority in relation to Community competition policy. Alternatively, decentralisation may give the Commission the time to set a more overt competition policy.

²⁰ Massey (1996), pages 122 and 123.

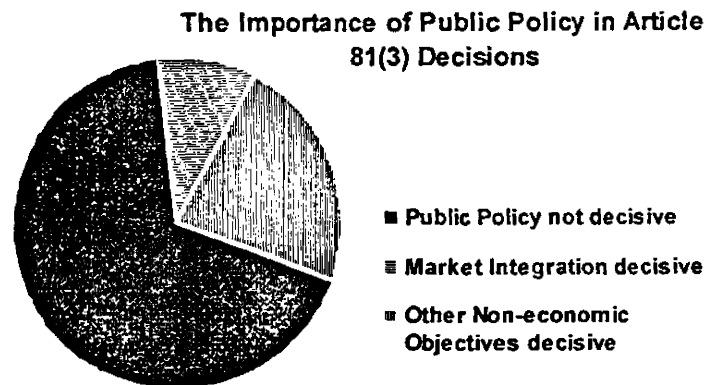
²¹ Gerber (1994), page 108.

²² Commission, *Article 81(3) Guidelines*, paragraph 3.

²³ Monti (2004), page 406.

²⁴ Commission, *Article 81(3) Guidelines*, paragraph 42. van Gerven (2004), page 434, makes the same point.

However, this assertion is not reflected in formal Commission decisions under article 81 of the Treaty. In fact, we estimate that, between 1993 and 1 May 2004, public policy considerations were decisive (i.e. altered the result) in over 32% of formal article 81(3) decisions, see the pie chart below.²⁷



As Amato has wisely said, the objectives of Community competition policy is not a new topic but today's context provides new and intriguing elements:

"It requires a frank discussion, because it is doubtful that we all agree on the goals of competition. Generally, however, we refrain from discussing it openly, and ambiguities remain."²⁸

Ehlermann adds:

"An issue that has not yet been debated, and should be, is the borderline between article 85(1) [now article 81(1)] revisited and article 85(3) [now article 81(3)]. It is assumed to be legitimate to bring into the analysis under article 85(3) goals other than purely competition goals. Is this a legitimate assumption? There has been practically no thorough analysis of this issue until today, in part because of the fudging between article 85(1) and article 85(3).

²⁵ See, for example, van der Woude (2002), pages 55 and 56; Lenz (2000), page 62 and Heimler and Fattori (1998), page 599.

²⁶ See, Chapter One.

²⁷ As these objectives are not always discussed overtly, some subjective interpretation is required. As a result, my categorisation of some decisions may be controversial. Nevertheless, these numbers are taken from Table 1 in the Annex. Table 1's numbers are detailed and explained in Table 2 in the same Annex. Furthermore, whatever the precise numbers, the pie chart demonstrates that non-economic objectives were important in a far from negligible number of cases. This underlines the importance of this thesis.

Shelkopyas (2003), page 229 and Monti (2002), page 1091, suggest that the amount of public policy in article 81 is increasing. My research does not support the idea that, of late, non-economic objectives have been decisive in article 81 more often (either absolutely, or as a percentage of decisions), see Annex; although, market integration has been used more often in article 81(1) of late. However, the Commission often relies on non-economic objectives in its reasoning more overtly. This might be the effect that Monti and Shelkopyas refer to.

²⁸ Ehlermann (1998), page 3.

However, once the borderline is clearly drawn with respect to the difficult notion of a restriction or distortion of competition, this becomes the fundamental question."²⁹

This thesis attempts to force the issue, in light of the paucity of recent, systematic, English language analysis in the area.³⁰ We have seen that the way one interprets the competition provisions can fundamentally affect their implementation. Previous analysis often focused on the *effects* of interpreting a provision in a certain way, see below, as opposed to discussing whether said interpretation fits within the Treaty's framework. A systematic approach to interpretation also demands that we constantly update our analysis of Treaty provisions. Ideas and interpretations that may have seemed adequate twenty years ago no longer seem appropriate, in light of the Treaties of Maastricht and Amsterdam.³¹ This is due to the addition of many new policy heads, such as environmental protection and public health. Finally, it is important to examine the interaction of public policy within article 81 as a whole. Recent studies discuss its interaction with specific policies.³² Our approach locates article 81 within the Treaty *as a whole*. This is important, due to the systematic element, mentioned above.

The thesis is in three sections. Part A, briefly mentioned above, asks whether non-economic objectives should be considered in antitrust and what the theoretical limits should be, see Chapter One. Then, Chapter Two examines article 81 of the Treaty in particular. It provides a systematic analysis of the Treaty, Community Court judgments and Commission practice.

The conclusions of Chapters One and Two appear somewhat different. Chapter One argues, in a legal vacuum, that the consideration of non-welfare objectives is warranted, but only under strict conditions. Chapter Two reveals a Treaty, and Community institutions, that readily embrace the consideration of these objectives. It reveals no limits to this balance. There are, of course, some. Article 81(3) of the Treaty, for example, demands that four conditions be fulfilled before exemption can be granted. Other limits are discussed in Chapter Four. Part C examines the issue in more detail and suggests ways of injecting our theoretical insights into the Community system.

Given that non-economic objectives should be considered in article 81, Part B discusses how and where public policy balancing is currently performed there, as well as how important non-economic considerations have been in the Commission's analysis. It is vital to understand precisely what is happening today, to assess whether changes are needed. Sections B's findings are disturbing. Non-economic objectives are considered in both article 81(1) and (3), see

²⁹ Ehlermann (1998), page 480.

³⁰ Monti (2002) is an excellent recent exception. However, as explained below, we disagree on many points.

³¹ Even Bouterse (1994) seems outdated now.

³² For example, Cseres (2004) (consumer protection); Vedder (2003) (environmental policy); and Sauter (1997) (industrial policy).

Chapters Three and Four, respectively. There is no guidance, or consistency, about when one paragraph is more appropriate than the other. There is no explanation of what objectives might be considered relevant and why. In fact, the very consideration of these objectives is often disguised. Nor are we told how much weight these values should be given. Even the appropriate balancing mechanism is unclear, Chapter Five. There is much work to do, and, as explained above, answers are urgently needed.

"...[S]ince the foregoing objectives will not always be in perfect harmony, there is a requirement for a careful balancing of these sometimes competing objectives in the administration of competition law, and the need for an administrative framework that ensures independent and effective decision-making in the implementation of the law."³³

Part C makes some suggestions in this regard. The realisation that non-economic objectives can be relevant in article 81 decisions demands a fundamental reassessment of that provision. Part C draws together the problems raised above. It suggests a framework for the consideration of non-economic objectives. It puts three elements at the heart of the proposal:

- the proposed system must respect the Treaty, unless amendments are proposed;
- businesses, decision-makers and consumers need clarity and transparency; and,
- decision-makers must be able to consider relevant non-economic objectives within article 81.

Chapter Six discusses article 81(1) of the Treaty. It highlights two substantive problems in relation to this provision. First, the definition of a 'restriction of competition'. The test proposed by the Commission and the CFI is unclear and unsatisfactory. An economic efficiency standard is suggested. Secondly, Chapter Six discusses the consideration of non-economic objectives within article 81(1) of the Treaty, arguing that this should not occur there. These two suggestions provide greater clarity, while, we argue, respecting the Treaty's *telos*.

Chapter Seven analyses the four tests under article 81(3) of the Treaty. It considers some of the implications of incorporating non-economic objectives within article 81 and suggests how this might better be done. In light of the balancing test under article 81(3)'s first condition and our conclusions in Chapter One, Chapter Seven also suggests that article 81(3)(a) should be reinterpreted, and that the other two article 81(3) conditions be removed. Finally, Chapter Eight provides a framework for balancing the non-economic objectives under article 81(3)'s first test.

Before concluding this Introduction, three further issues must be discussed. First, we noted above that although many competition lawyers object to the consideration of non-economic

³³ Goldman and Barutciski (1998), page 415. Their discussion centres on balancing long and short-term efficiency in Canadian antitrust. Nonetheless, their underlying point is relevant to balancing non-economic objectives in Community competition law too.

objectives within competition law, they rarely articulate their reasons. However, one reason that has been cited of late is that, post-decentralisation, Member States' courts will frequently have to apply the whole of article 81 of the Treaty. It is often said that courts are inappropriate fora for the consideration of public policy balancing.³⁴ Even if this is taken as correct, and there is some doubt about that,³⁵ then it does not mean that public policy can no longer be considered in article 81 of the Treaty. If these arguments are right then, either the Treaty system as a whole must be re-considered, or Regulation 1/2003 must be considered *ultra vires*, for secondary legislation must respect substantive Treaty provisions.³⁶ As a result, we ignore this issue and focus on ways to help the relevant actors weigh non-economic objectives within article 81 of the Treaty.

Secondly, antitrust, particularly antitrust discussions involving non-economic objectives, involves a combination of economics, politics and law. However, this thesis has been written by a lawyer, from a legal perspective. There is, accordingly, an emphasis on the interpretation of legal texts and case law, which in part eschews other contemporary approaches influenced by sociology and political science. As a result, Chapter One briefly discusses economic concepts, but principally to show that economics is not value neutral. It does not enter into complex economic analysis in pursuit of the balance. Economists must adapt their tools for the job the law requires. Nor does the thesis focus on arguments about whether or not non-economic objectives should be considered within article 81 at all. Once Chapter Two demonstrates that this should happen, as a lawyer, I accept this position and move on to discuss how best to do that in the Community legal order. Secondly, this thesis does not itself provide a meta-objective for balancing within article 81, although it makes suggestions in light of the Treaty. Nor, as a result, does it discuss specific weights to be attributed to the relevant objectives. In our view, these are political tasks, for which a lawyer is not well adapted.³⁷

Finally, this thesis restricts itself to a mainstream discussion of public policy under article 81 of the Treaty. It mentions articles 82 and the ECMR only briefly. Article 81 has been chosen

³⁴ Whish (2003), pages 154-156; Shelkopyas (2003), page 226; Jones and Sufrin (2001), page 191; Woods in Ehlermann (2001), page 638; Whish and Sufrin (2000), pages 151 and following; Wesseling in Ehlermann (1998), page 485. See also the references in Monti (2002), pages 1092 and 1093.

³⁵ Obviously, judges (and national competition authorities) take political decisions too, see, for example, Sturges and Chubb (1988), Chapter Six. One could argue that this sort of more general balancing (see Chapter Seven) is different to weighing two competing objectives; but, Gyselen (2002a) also points out that the Member States' courts already conduct a similar balancing process in relation to other Treaty provisions.

³⁶ See, Case 48/72 *S.A. Brasserie de Haecht v. the spouses Wilkin-Janssen* [1973], paragraph 6; Baquero Cruz (2002), pages 56 and 57, and the references made there; and Mestmäcker (2000), pages 414-416 "Article 83 regulations are to give effect to the principles enshrined in the competition rules. They cannot change these principles nor can they modify the Treaty."

³⁷ Bourgeois and Demaret (1995), page 110. That is not to say that none of the choices I make affect the weight of non-economic objectives, just that I try to keep this to a minimum. I also make every effort to highlight such effects when they occur.

because there is a rich body of caselaw under this provision. It has also been an area of considerable focus of late for the Commission in its policy statements. Furthermore, within the field of EC antitrust law, only the general context is really discussed. Exceptions to these rules, as in force in, for example, the agricultural and transport sectors, are highlighted only insofar as the general discussion requires.³⁸

³⁸ Special rules relating to public undertakings and undertakings to which Member States grant special or exclusive rights, article 86, are not considered either.

**PART A: THE CONSIDERATION OF NON-ECONOMIC
OBJECTIVES IN ANTITRUST**

INTRODUCTION TO PART A

Competition policy cannot be rational until we decide what its underlying objectives are. Should the exclusive focus of antitrust be consumer welfare or ought we consider other public policy objectives there too? If the later, how should we deal with conflicts between these aims?

Part A approaches the debate from two perspectives. Chapter One conducts a theoretical analysis in a legal vacuum; which means that the assessment is not made within the context of a specific legal system. It poses (and answers) two core questions:

- *why* might competition policy incorporate non-welfare objectives? and,
- *when* might it be appropriate to consider non-welfare objectives in competition policy?

Chapter Two changes the emphasis, examining the issue within the context of a specific legal system, the European Union, specifically article 81 of the Treaty. There is a consensus that non-welfare objectives have been considered there in the past. However, Chapter Two re-examines the debate because academics often assume that the influence of political considerations on competition policy is unwarranted and recent Commission policy statements support this view. Chapter Two places article 81 in its Community context. It examines the Treaty as a whole and investigates *how* it deals with public policy conflicts. Then, it analyses *how* the Community Courts have interpreted the Treaty in relation to conflicts between public policy and competition. Finally, it examines the Commission's policy statements in more detail and asks whether they are reflected in its decisions.

The conclusions of Chapters One and Two appear somewhat different. Chapter One argues, in a legal vacuum, that the consideration of non-welfare objectives is warranted, but only under strict conditions. Chapter Two reveals a Treaty, and Community institutions, that readily embrace the consideration of these objectives. It reveals no limits to this balance. There are, of course, some, which are discussed in Chapter Four and Part C.

CHAPTER ONE: IN THEORY (WHEN) SHOULD WE CONSIDER PUBLIC POLICY IN COMPETITION LAW?

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1. INTRODUCTION

In most jurisdictions with a competition law, the stated objective of the legislation is to improve economic efficiency.³⁹ Many economists believe that economic efficiency (welfare) should be the exclusive focus of competition policy. A leading textbook notes they:

"...generally view antitrust as a set of laws designed to promote competition and, therefore, economic efficiency."⁴⁰

This view has been echoed by the World Bank.⁴¹ Hovenkamp has also said that no one in the mainstream United States debate:

"...would any longer assert that consumer welfare should not be the central or even exclusive goal of antitrust, or that antitrust should be concerned about unemployment, inflation or other macroeconomic issues."⁴²

³⁹ UNCTAD's submission to OECD (2003), page 4.

⁴⁰ Viscusi, Vernon and Harrington (1995), page 63. Also see, Motta (2004), section 1.3; Bishop and Walker (2002), pages 23-27; Posner (2001), page ix; Palgrave Dictionary of Economics (1998), page 82; Bork (1993), pages 89 and 405 and Jorde and Teece (1992), page 4.

⁴¹ <http://www1.worldbank.org/beext/faq/q8.htm>

⁴² Ehlermann (1998), pages 12-13. See also, United States' submission to OECD (2003), pages 2 and 5; Hovenkamp (1998), page 328 and Lipsky (1998), page 331. For a contrary view see, Fox (1998), page 15 and Laussel and Montet (1995), page 57 and the references there.

The OECD Global Forum on Competition and UNCTAD both note that, increasingly, competition systems place greater emphasis on economic efficiency, rather than other public interests goals.⁴³

That said, in many jurisdictions, competition policy also pursues 'non-efficiency' objectives.⁴⁴ Canada's competition law, for example, as explained by section 1.1. of its *Competition Act* 1986, was promulgated:

"...to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognising the role of foreign competition in Canada, in order to ensure that the small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices..."

Some argue that competition policy should only promote welfare. Others believe that it should also advance non-efficiency objectives. In the face of this disagreement, Chapter One poses two core questions. First, *why* might competition policy incorporate non-welfare objectives? Secondly, *when* might it be appropriate for competition policy to consider non-welfare objectives? Both questions are discussed from a theoretical perspective.

Section 2 deals with the first question, why might competition policy incorporate non-welfare objectives? The discussion is in two parts. First, some suggest that total surplus is a value-neutral concept, increasing the gains for society as a whole. They assert that even if this produces an outcome which is 'unfair', this can be corrected by redistribution later. For example, Motta says:

"...this concept of welfare [total surplus] completely overlooks the issue of income distribution among consumers and producers...The welfare measure is a summarising measure of how efficient a given industry is as a whole and does not address the question of how equal or unequal income is distributed, which can be dealt with by other measures. Note also that the rationale for not considering distributional issues is that in principle it is possible to operate redistribution schemes such that consumers and producers are *both* either better off or worse off."⁴⁵

If this were true *in practice*, policies that advance total surplus (such as many competition policies⁴⁶) might be given a special (privileged) status. Why? Because, so the argument goes, they make society as a whole better off, once any necessary re-distribution has taken place. As a

⁴³ Respectively, OECD (2003), pages 3, 4 and 12 and UNCTAD (1995), page 6. See also, Ehlermann (1998), pages ix, 323, 347 and 354.

⁴⁴ Shyam Khemani (2002), page 11; Fox (2000) and UNCTAD, *Model Law on Competition*, pages 13-15.

⁴⁵ Motta (2004), page 18. See also, Shyam Khemani (2002), page 15; Lyons (2002), page 1; Bork (1993), page 111; Scherer (1987), pages 998 and 999; Williamson (1977), page 711 and Williamson (1968), pages 27 and 28.

⁴⁶ Almost all jurisdictions with a competition law use it to improve welfare, although not always total surplus, see below.

result, undermining a competition policy's welfare standard would make everyone (collectively) worse off and should be considered rarely, if at all.

Section 2.1. argues that, *in practice*, no welfare standard is value-neutral.⁴⁷ Consumer welfare may enhance consumer protection, this is less true of producer welfare. Total surplus' objective of making society as a whole better off is itself value-laden. What does 'better off' mean, for example?⁴⁸ The decision-maker advances different public policy goals as a result of the welfare standard it chooses. This undermines any special status claim, based on neutrality, that the competition rules might have. As a result, balancing various public policy objectives within the competition law may be acceptable in case of conflict.

Then, Section 2.2. highlights the potential for conflict between welfare and other important public policy objectives. It demonstrates how the pursuit of welfare sometimes boosts, and sometimes undermines, other policy objectives. First, from an 'internal' perspective, Section 2.2.1. and then from an 'external' perspective, Section 2.2.2.

Why might competition policy incorporate non-welfare objectives? If competition policy pursues goals in a similar way to other policies and if its goals conflict with other policy goals, a framework must be found for dealing with these clashes. This is not the whole story. Section 3 considers the pros and cons of accounting for non-welfare public policy objectives within competition policy. It asks *when* it might be appropriate for competition policy to promote non-welfare objectives because it is inefficient to resolve all conflicts in this way.

We must answer these two questions before discussing the objectives of competition law. This is because they provide theoretical insights into when it is rational to consider non-economic objectives in antitrust. This is particularly relevant in Part C of this thesis, when we ask when non-economic objectives should be considered within Community competition law.

2. WHY MIGHT COMPETITION POLICY INCORPORATE NON-WELFARE OBJECTIVES?

2.1 A special status for competition policy?

Section 2.1. provides a rough definition of consumer surplus, producer surplus and total surplus.⁴⁹ Then it shows that all three welfare standards have public policy objectives embedded within them. This undermines the economists' claim that the total surplus standard is value-

⁴⁷ Motta (2004), pages 17-22; Fox (1998), pages 11 and 12; Hovenkamp (1998), page 13 and Frazer (1990), page 621.

⁴⁸ See, Arnall, Dashwood, Ross and Wyatt (2000), pages 540 and 541, and the references made there.

⁴⁹ The textbooks referred to above contain more polished definitions, particularly Motta (2004), section 1.3. Also see, Bishop and Walker (2002), Chapter Two.

neutral. In which case, where antitrust's policy goals conflict with other public policy aims resolution through balancing may be appropriate.

Consumer surplus is the aggregate measure of the surplus of all (relevant) consumers. Motta explains that the surplus of a specific individual consumer is given by:⁵⁰

"...the difference between the consumer's valuation for the good considered (or her willingness to pay for it) and the price, which effectively she has to pay for it."

Likewise, *producer surplus* is the aggregate measure of the surplus made by all (relevant) producers. The surplus of an individual producer is the profit it makes from selling the good in question. Finally, *total surplus* is the sum of the consumer and the producer surplus.

Economists point to a relationship between market power⁵¹ and three types of efficiencies. The first is *allocative efficiency*. Where costs are given and prices rise above⁵² marginal cost,⁵³ the producer surplus increases, producers receive higher profits.⁵⁴ The consumer surplus falls. The increase in the producer surplus is normally less than the fall in the consumer surplus caused by the higher prices. Therefore, price increases normally increase producer welfare at the expense of both consumer and total welfare.⁵⁵

Posner suggests that the negative effects of market power may exceed the allocative efficiency losses:

"The existence of an opportunity to obtain monopoly profits will attract resources into efforts to obtain monopolies, and the opportunity costs of those resources are social costs of monopoly too..."⁵⁶

Some of these rents do not have any social value.⁵⁷ Consumers also incur costs lobbying to counteract the firms' rent-seeking behaviour; enforcers would also face increased costs.⁵⁸

⁵⁰ Motta (2004), page 18.

⁵¹ A firm has market power when it can (profitably) raise prices above the competitive level, Motta (2004), section 2.2.1. and Bishop and Walker (2002), pages 43-51.

⁵² Or fall below marginal costs, Bishop and Walker (2002), page 25 and Fishwick (1993), page 16.

⁵³ Marginal cost is the increment to total costs that results from producing an additional increment of output, Motta (2004), page 447 and Bishop and Walker (2002), page 22. The marginal cost is hard to calculate in practice, see, for example, Motta (2004), page 116 and Brodley (1987), page 1030.

⁵⁴ Motta (2004), Section 2.2.2. explains why.

⁵⁵ This is not always the case, however. Imagine that the parties to a joint venture agreement were, through the agreement, able to significantly cut their fixed costs, in relation to research and development, for example. As a result, there might be an increase in total surplus, as the parties could make larger profits; although, any price rises that the agreement permitted would reduce the consumer surplus. See, Fishwick (1993), page 56, for example.

⁵⁶ Posner (1975), page 807. See also, Scherer (1987), page 1000.

⁵⁷ Posner (1975), page 811. However, some rent-seeking does create socially valuable results, Posner (1975), page 811. Advertising may increase the information available to consumers, for example, Motta (2004), page 45.

There is also a relationship between market power and *productive efficiency*.⁵⁹ Firms with market power often exhibit less productive efficiency because, as they are exposed to less competitive pressure, they can make less effort to use (and find) the best available technologies, to improve their products and to innovate. This means higher costs for the firms and, normally, higher prices for consumers. Productive efficiency losses can be as large as allocative efficiency losses.⁶⁰

Economists offer two theories for the relationship between market power and productive efficiency. First, managers of firms with market power have less incentive to make effort and be more productive.⁶¹ Increasing competition reduces managerial slack. However, this is so only up to a point. Motta argues that "...increasing pressure in a market where there is already a great deal of competition might reduce efficiency."⁶²

Secondly, where competition exists, more efficient firms will survive and thrive, whereas less efficient firms will be forced to exit the market. So, competition increases productive efficiency by selecting the most efficient firms. As Motta points out:⁶³

"This has also an additional implication for competition policy: if less efficient firms were protected or subsidised, this would prevent market competition from selecting the best firms, which will actually result in higher prices and lower welfare."

Furthermore, where firms incur (recurrent or start-up) fixed costs, the duplication of these costs represents a static dynamic efficiency loss. This highlights another trade-off with allocative efficiency. More firms means more competition, driving prices down (allocative efficiency), but this involves a loss of economies of scale (productive inefficiency).⁶⁴

⁵⁸ Posner (1975), pages 811 and 812.

⁵⁹ Productive efficiency occurs when a given set of products are produced at the lowest possible cost, given *current* technology, input prices, etc., Bishop and Walker (2002), page 20.

⁶⁰ Bishop and Walker (2002), page 26; Neven (1998), page 114; Scherer and Ross (1990), pages 668-672; Scherer (1987), pages 1002 and 1018 and Brodley (1987), pages 1026 and 1027.

⁶¹ Under atomistic competition, firms whose production costs are above those of their rivals will exit the market due to losses, Bishop and Walker (2002), page 20. Managers whose firms do not face this risk, or do so less immediately, might not have the right incentives to adopt the most efficient decisions about technologies. Why? In many firms there is a separation between ownership (shareholders) and control (managers). Managers do not only care about the firm's profits, but also "...their individual utility, determined by wage, career prospects, as well as the level of effort and time they have to put into the job.", Motta (2004), page 47. See also, Scherer (1987), pages 999, 1000 and 1004-1010.

⁶² Motta (2004), pages 47 and 48.

⁶³ Motta (2004), page 51.

⁶⁴ Motta (2004), pages 51 and 52 and Scherer (1987), pages 1002 and 1003.

The third type of efficiency is *dynamic efficiency*.⁶⁵ To some extent, firms with market power have less incentive to innovate than firms that face more competition. This is not a linear relationship however, because firms' incentives to innovate are determined not only by the existence of competition, but also by the possibility of appropriating the results of their investments.⁶⁶ Where there is strong competition, appropriability is reduced and so is the incentive to invest and innovate.⁶⁷ Dynamic efficiency losses may be even larger than allocative and productive efficiencies.⁶⁸

We have discussed three welfare standards and briefly examined three types of efficiency and their relationship with market power. Now we briefly analyse the relationship between these welfare standards and the different efficiencies.

Consumer welfare is explicitly concerned with gains to consumers.⁶⁹ Hovenkamp has said that enhancing consumer welfare is probably the exclusive goal of Federal antitrust law in the United States, see above. It is also an objective of Community competition policy.⁷⁰ Indeed, focusing on consumer welfare in competition policy has widespread political acceptance.⁷¹

The consumer surplus test ignores increases in the producer surplus. Reductions in allocative efficiency are unacceptable, regardless of their effect on producer welfare, because consumers suffer. This is in direct contrast to the position under a producer welfare standard, which is concerned with gains to producers alone. As Motta notes,⁷² this illustrates the main interests behind the different situations:

⁶⁵ This is the extent to which a firm introduces *new* products or processes of production, Motta (2004), section 2.4 and Bishop and Walker (2002), pages 36-39.

⁶⁶ See, Scherer (1987), pages 1010-1019.

⁶⁷ Forcing firms to continually lower their prices and profits, reduces their incentive to innovate, invest and introduce new products. This is because, at marginal cost, they cannot recover their fixed costs, Motta (2004), page 21. Furthermore, managerial slack affects dynamic efficiency in the same way as productive efficiency, Motta (2004), page 48. There is a need to balance fierce allocative competition with some ability to appropriate the results of their research, see also, Fishwick (1993), page 39; Scherer and Ross (1990), Chapter 17 and Schumpeter (1942). Note that the extreme position adopted by Schumpeter has been refined later, see, for example, Faull and Nikpay (1999), pages 40-43; Areeda, Solow and Hovenkamp (1995); Gual (1995), pages 19-21 and the references made there and Scherer (1987), pages 1000-1002, 1014 and 1019.

⁶⁸ Neven (1998), page 114; Scherer (1987), pages 1002 and 1018 and Brodley (1987), page 1026.

⁶⁹ Whish (2003), page 3 and Brodley (1987), pages 1020, 1021, 1032 and 1033. Chapters Five and Seven discuss the definition of 'consumers', in the Community context.

⁷⁰ "The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.", Commission, *Article 81(3) Guidelines*, paragraph 33. See also, Chapter Two; Mario Monti (2004), page 7; Cseres (2004), page 231; Commission, *Vertical Guidelines*, paragraph 7; COM(98) 544, page 5; Neven, Papandropoulos and Seabright (1998), page 12 and COM(96) 721, Executive Summary, paragraph 25 and Chapter V.

⁷¹ OECD (2003), page 5 and Lyons (2002), page 1.

⁷² Motta (2004), page 43.

"An industry's producers will try to lobby in favour of more protection and less competitive pressure, while consumers and users of the industry products will have an interest in backing proposals of more competition."

Increasing competition compels producers to sell closer to their marginal cost. A similar position emerges in relation to both productive and dynamic efficiencies. Consumers (and the consumer welfare standard) would advocate more competition. In a competitive environment, firms have an incentive to invest and innovate in both existing and future technologies. Successful investments allow them to reduce their costs (and thus their prices), undercutting other firms, forcing their less efficient rivals to exit. However, as noted above, there comes a point where increasing competition undermines the incentive to generate both productive and dynamic efficiencies. What is the effect of this on the producer and the consumer welfare standards?

Because both current and future welfare matter,⁷³ a competition authority seeking to maximise consumer welfare will not increase competition at all costs. Under atomistic competition, maximum allocative efficiency occurs when prices equal marginal cost. However, if competition authorities force prices down to marginal cost then producers have less incentive to invest and innovate, see above. Possible future welfare gains are lost. Competition authorities need to balance the long-term need for innovation (and the future allocative benefits to be gained because of this) with the short-term allocative efficiency loss of letting prices rise above marginal cost; otherwise welfare (both consumer and total) may be undermined over time. There is disagreement about where this balance lies⁷⁴ and thus, how much competition is 'good' for consumers.

Producers seeking to enhance their own welfare would also highlight the ambiguous effects of increasing competition on both dynamic and productive efficiencies. But they have an additional reason for doing so. Less competition may reduce their incentives to innovate, but it also means that they can appropriate a larger share of any gains they make through such innovation.

The decision to pursue either a consumer welfare or a producer welfare standard depends on a value judgment. This is based on an assessment of whether it is more important to protect the

⁷³ See, Motta (2004), page 19; Mexican submission to OECD (2003), page 3; Faull and Nikpay (1999), pages 38-40; Jorde and Teece (1992), page 4 and Brodley (1987), page 1033. Although the relative importance of present and future welfare is a political question that should be clarified by the decision-maker, see Chapter Eight.

⁷⁴ Motta (2004), page 57; Ahdar (2002), pages 350-353; Fels and Edwards (1998), pages 59-61; Fishwick (1993), page 19; Brodley (1987), page 1036-1041 and Scherer (1987), page 1011.

interests of consumers or producers.⁷⁵ This, in turn, determines which efficiencies (and thus how much competition) the regulator considers beneficial.

As we saw above, many economists try to circumvent this political debate by focusing on total surplus.⁷⁶ In their view this avoids the need for interpersonal comparisons and subjective value judgments about what is fair and equitable. Focusing on total surplus means that "society's pot" is bigger, so there is more wealth to share, including for any redistribution if the competitive outcome were felt unfair.⁷⁷

If a total surplus standard makes everyone better off (after a hypothetical redistribution) should competition laws that pursue this objective be given some kind of special status protecting them from interference, even where they conflict with other policy objectives? The point being that reducing total surplus makes society worse off. A special status argument is hard to accept:

- (i) First, it ignores the harm that might be done to other relevant policy objectives by the pursuit of this goal. We must at least ensure that the harm to other policies is less than the total surplus 'gain';
- (ii) Secondly, the objective of increasing society's *economic* wealth is itself a value-laden objective.⁷⁸ It emphasises material wealth. Admittedly, this is an important political objective that governments invariably pursue. That said, other policy goals are also significant. Section 2.2. shows that this goal may undermine other objectives. It may come at the expense of public health, for example, or the environment.

Once we realise that the total surplus objective is a value-laden concept, then arguments that it should be given a special status, where it conflicts with other public policy objectives, become even harder to defend.

- (iii) Thirdly, there is reason to believe that the total surplus standard does, in fact, redistribute from consumers to producers (and their owners):⁷⁹

⁷⁵ Ahdar (2002), pages 342-347; Fox (1998), pages 11 and 15; Hawk (1998), page 16 and Frazer (1990), page 623. Neven argues that value judgments are not needed, Neven (1998), page 17. He says that there is merely good and bad economics. However, this argument does not stand up to close examination once we understand that whose welfare we measure can radically affect whether or not we believe an agreement to be welfare enhancing.

⁷⁶ Canada may have adopted a total welfare test, other countries have too, see, Mexican submission to OECD (2003), page 3; Lyons (2002), page 1; Shyam Khemani (2002), pages 14 and 15; Matte (1998), page 21 and Crampton (1997), page 60.

⁷⁷ Although, even those economists that advocate the total surplus standard do not avoid difficult decisions. They still need to balance short-term allocative efficiencies with productive and dynamic efficiencies, see above.

⁷⁸ Ahdar (2002), pages 348-350, and references made there and Brodley (1987), pages 1023, 1035 and 1036.

⁷⁹ See, for example, Brodley (1987), pages 1035 and 1036 and Comanor and Smiley (1975): Some economists try to turn this issue on its head. They note that, increasingly, producers and consumers are not two isolated groups.

(a) where producer and consumer welfare are considered equally important, then the interest group with the most power (resources) is likely to have a disproportionate effect on the outcome of an antitrust dispute.⁸⁰ This is often the producers. As a result, the total welfare model is likely to give greater weight to producer welfare gains;⁸¹

(b) the strength of the producers' bargaining position is reinforced by the fact that it is they that make the deals. However, these are dressed up, deals are done out of self-interest for the firms concerned;⁸² and

(c) the producers have informational,⁸³ distributional⁸⁴ and timing advantages that may have an important effect on outcomes in antitrust disputes.

This may help to explain why the consumer welfare standard is the most popular welfare standard, from a political perspective as it helps tip the balance in favour of these weaker/ under-represented groups.⁸⁵

- (iv) Finally, the economists' position assumes that even if the distribution created by the total surplus is considered 'unfair' a redistribution can be performed later (if this were considered necessary⁸⁶). However, this redistribution can fundamentally undermine the actors' underlying incentives. As a result, economists tend to interfere at the redistribution level too, arguing that it should be kept to a minimum.⁸⁷ Furthermore, redistribution is not always possible or convenient.

Consumers hold shares in firms, sometimes directly, often indirectly through pension, or other investment, funds. As a result, valuing the interests of consumers above those of producers affects consumers too, Lyons (2002), page 1 and Motta (2004), page 21. First, not all of the reduction in the consumer surplus is transferred to the shareholders, see above for the discussion on managerial slack, for example. Secondly, unless all consumers are shareholders then any re-distribution to consumers is likely be to the richer ones, Ahdar (2002), page 346. Finally, this is unlikely to be as efficient a means of re-distributing to consumers as a consumer welfare standard.

⁸⁰ Neven, Papandropoulos and Seabright (1998), page 19.

⁸¹ Motta (2004), page 21 and Lyons (2002), page 3 and the references made there and Buigues, Jacquemin and Sapir (1995a), page xii.

⁸² Need to encourage consumers, employees, savers and shareholders to stand up against the strength of producers, Amato (1997), page 125.

⁸³ Motta (2004), page 21 and Lyons (2002), pages 2 and 3 and the references made there.

⁸⁴ An anti-competitive agreement's effect on consumers is likely to be dispersed among many of them, while it is much less dispersed for producers. See, Motta (2004), page 20, for an example.

⁸⁵ As to why this is necessary see also, Amato (1997), page 125. Lyons (2002), page 2, suggests other reasons too.

⁸⁶ Which is not the case under Kaldor-Hicks efficiency, because the redistribution is only *hypothetical*.

⁸⁷ This is the implication of Laussel and Montet (1995), page 58, for example.

There is a lot of debate about which welfare standard is best.⁸⁸ This section does not discuss this. Instead, it demonstrates that all three welfare standards demand value judgments based on a preference for either consumer or producer interests. Furthermore, even if we could agree on one standard, for example, consumer welfare, there is disagreement about how much competition is optimal for achieving this end. The amount of competition considered 'optimal' by the competition authority affects other policy objectives, as Section 2.2. explains.

The underlying point is that, like other policy instruments, competition policy's welfare objective is value-laden and itself based on public policy objectives. It is a policy tool (like any other) and should not necessarily be given a special status where it conflicts with non-economic policy objectives.

2.2 Welfare standards and their influence on public policy

The purpose of this section is to demonstrate how competition policy can either promote or undermine some non-economic policy objectives. Competition's direct benefits are summarised in UNCTAD's submission to OECD (2003), pages 2 and 3, which states that competition is a means of creating:

"...markets responsive to consumer signals, and ensuring the efficient allocation of resources in the economy and efficient production with incentives for innovation. This is expected to lead to the best possible choice of quality, the lowest prices and adequate supplies to consumers..."⁸⁹

Many believe that a consumer welfare standard⁹⁰ also has other, indirect, benefits. The same UNCTAD statement continues:

"Efficient allocation and utilisation of resources also lead to increased competitiveness, resulting in substantial growth and development. There is growing consensus that competition is an essential ingredient for enhancement and maintenance of competitiveness in the economy."

Indeed, the Commission once said:

"...it will often appear that these Community policies [Community policies in general, not including competition policy] rely on competition for their effective implementation and

⁸⁸ See, for example, Motta (2004), pages 18-22; Whish (2003), pages 18-20; Lyons (2002); Ahdar (2002); Bishop and Walker (2002), pages 25-27; Porter (2001), page 935 and Brodley (1987).

⁸⁹ See also, Bishop and Walker (2002), page 11 and the Supreme Court of the United States of America in *Northern Pacific Railway Co. v. United States*, page 4, for example.

⁹⁰ This chapter focuses on the consumer surplus standard as it has been adopted in some influential jurisdictions, see above. Motta (2004), pages 18-22, argues that where consumer surplus is maximised over time it is similar to a total surplus standard.

that enforcement of the competition rules supports the objectives pursued by these policies."⁹¹

So, competition has many direct and indirect benefits. Sometimes competition's effect on other policies is ambiguous. It can also have negative effects (costs) on society, or certain groups within it. These might justify intervention in the market mechanism. They can include:

"...external costs and benefits, distributional effects and unemployment. Elements of 'market failure' arising from these welfare considerations are not generally corrected by competition policies - indeed such policies may aggravate them."⁹²

Section 2.2. briefly illustrates how some public policy objectives are influenced by the consumer welfare standard.⁹³ The analysis comes in two segments. Section 2.2.1. focuses on this issue from an 'internal' perspective.⁹⁴ Then, Section 2.2.2. considers the 'external' perspective,⁹⁵ by examining the relationship between competition and two other policy areas, market integration and employment policy.

2.2.1 'Internal' influences of the welfare standards

Section 2.2.1. focuses on the welfare standards' influence from an 'internal' perspective. It examines three areas of public policy: consumer protection, industrial policy and research and development. There is also a discussion about internalising externalities, environmental policy is used as an example.

⁹¹ Commission, *RCP 1991*, page 39. For example, see CES, *Green Paper on vertical restraints*, paragraph 1.2., which argued that the importance of the Community competition policy on vertical restraints was "...confirmed by the fact that producer-distributor agreements (or vertical restraints), designed to enhance the efficiency of distribution between companies and to facilitate penetration of new markets, contribute significantly to achieving two basic objectives of competition policy: promoting the integration of Member State economies in a single internal market, and maintaining effective competition throughout the Community's territory - which are both preconditions for European economic competitiveness, economic and social cohesion, and promoting consumer well-being." This is also supported, to some extent, by economic thinking, for example, Brodley (1987), page 21, has said "...the pursuit of the correctly defined economic goals of antitrust will generally advance the social and political objectives of the law as well."

⁹² Fishwick (1993), page 21. See also, Poiares Maduro (1999), pages 466-470 and Fishwick (1993), pages 21-25.

⁹³ The discussion is necessarily brief because, as pointed out in the Introduction, this thesis does not argue in favour of including (or excluding) industrial policy, or other public interest objectives, within Community competition policy. This has been discussed many times and references to relevant works are provided. Instead, this thesis discusses, where inclusion is necessary, albeit politically or economically, how best to do it.

⁹⁴ This means that emphasising specific elements of the consumer welfare test might enhance (or undermine) policy objectives other than 'consumer protection', defined in a wide sense, see below. In this way, the internal logic of the consumer welfare standard can be used to directly promote certain public policy goals, *when making the welfare assessment*.

⁹⁵ This means that the consumer welfare standard might enhance (or undermine) policy objectives that are not considered within it.

Consumer protection

We have already seen how competition policy can contribute towards certain types of consumer protection.⁹⁶ For example, it can help protect consumers' economic interests by helping to ensure low prices.⁹⁷ This was one of the Canadian *Competition Act 1986*'s objectives. This is particularly the case where a consumer welfare standard has been adopted. That said, there is an equilibrium to be achieved between long and short-term consumer welfare, see above.

*Industrial policy*⁹⁸

We saw in the introduction that one of the objectives of the Canadian *Competition Act 1986* is "... to expand opportunities for Canadian participation in world markets..."⁹⁹ This chapter has already hinted that welfare, especially a producer welfare standard, could be used to promote the competitiveness of industry. Section 2.1. showed that this might also be achieved through a long-term consumer welfare standard. The largest gains to consumers can occur as a result of dynamic efficiency gains by firms. These most likely occur when firms can appropriate some of the benefits of their research and development, i.e. not when prices equal marginal cost.

Some suggest that the best form of industrial policy is competition itself:

"In its recent communication on industrial policy the Commission recognised that a healthy system of competition was one of the most effective ways to promote industrial change and improve the competitiveness of European industry."¹⁰⁰

Economists would normally agree. Motta argues, for example, that:

"...it is unlikely that firms in a particular industry are able to grow healthily if sheltered from competition, subsidised, or exempted from anti-cartel laws."¹⁰¹

But how much is optimal? Some advocate an interventionist approach in order to develop and strengthen national industries on the domestic and even the international stage. This might be

⁹⁶ See also, Commission, *RCP 2001*, pages 3 and 18-21 and Commission, *RCP 2000*, page 8. See also, Cseres (2004); Hovenkamp (1998), page 426 and Averitt and Lande (1996-7).

⁹⁷ Wide definitions of consumer protection refer to consumers' economic situation. For example, article 153(1) of the Treaty states that in order to "...promote the interests of consumers...the Community shall contribute to protecting the health, safety and *economic interests* of consumers..." [my emphasis] See also, Stuyck (2000), page 399.

⁹⁸ For a more detailed analysis see Buigues, Jacquemin and Sapir (1995).

⁹⁹ In the European Union, the ECMR lists some of the criteria that should be taken into account by the Commission when deciding whether or not a merger is compatible with the Common Market. These include the structure of markets outside the European Union, implying some kind of industrial policy criterion, article 2(1)(a), and the development of technical and economic progress, article 2(1)(b).

¹⁰⁰ Commission, *RCP 1990*, page 13. See also, Vickers (2004), page 5; Commission, *RCP 1999*, page 19; COM(90) 556, page 5; Commission, *RCP 1991*, pages 11, 223 and 260; Press Release, IP/94/809 and Commission, *Immunity Guidelines*, paragraphs 1 and 2.

¹⁰¹ Motta (2004), page 29. His second chapter also discusses competition policy's role in promoting productive efficiency. See also, Gual (1995), page 19, arguing for competition, within certain limits.

implemented, so the argument goes, by reducing domestic firms' exposure to competition, to some extent. Traditionally, this involves, for example, controlling market-entry or capacity expansion, channelling investment, providing subsidies and incentives to the state's own industries or allowing them to collude in research and development, or even later stages of distribution and marketing. In the Republic of Korea, for example, the government promoted the development of large conglomerates as a means of achieving economies of scale in mature heavy industries. One UNCTAD report states that the:

"...interaction of government policy and inter-firm rivalry stimulated the growth of technological capabilities and exports."¹⁰²

Some argue that consumer welfare maximisation might actually undermine industrial policy sometimes. This argument is particularly strong if there are market failures. Gual explains:

"...industrial policy measures designed as responses to market failures will conflict with the competition policy objectives in strategic or structural adjustment sectors. Typical examples are exemptions from competition policy that allow firm co-ordination or state subsidies designed to phase down capacity in mature industries."¹⁰³

There are strong arguments emphasising that, in general, competition has a positive effect on industrial policy. That said, at times some consumer surplus standards might undermine industrial policy objectives.¹⁰⁴ This is because it can lead to sub-optimal investment in research and development, or it may fail to allow for necessary strategic or structural adjustment. This problem might be overcome/ reduced by focusing on long-term consumer welfare benefits, i.e. by reducing competition to some degree in the short term. In this way, consumer protection and industrial policy can achieve an equilibrium within the consumer welfare standard.

*Research and development (R&D)*¹⁰⁵

We have seen a relationship between the amount of competition and firms' investment in R&D. Competition generally provides incentives for firms to innovate and invest in productive or dynamic efficiency enhancing technology.¹⁰⁶

¹⁰² UNCTAD document TD/B/COM.2/EM/10/Rev.1, page 14. The efficacy of this type of industrial policy has been questioned, see Townley (2004), pages 132 and 133, and the references made there; UNCTAD, *Corporate Policies in the Republic of Korea* and Chang and Choi (1988). The Treaty adopts a similar stance, see article 157(3). So does UNCTAD. The report cited above continued "...there have been numerous policy failures...and infant industry protection has often led to the creation of permanent infants."

¹⁰³ Gual (1995), page 20. More generally see, Gual (1995), pages 18-21, and the references to Motta (2004), above.

¹⁰⁴ Despite claims to the contrary by the then Commissioner Bangemann, Press Release, IP/94/809.

¹⁰⁵ For a more detailed analysis, see Buigues, Jacquemin and Sapir (1995).

¹⁰⁶ "...free markets subject to effective competition provide the best possible guarantee for offering consumers a good choice of quality products and services at reasonable prices. Furthermore, in many industries competition is one of the main drivers of innovation and job creation.", Mario Monti (2002a), page 9. See also, Commission, *RCP 2002*, page 19; Commission, *RCP 2001*, page 3; Commission, *RCP 1991*, pages 44-46 and the Commission's reply to the

However, above a certain point, more competition undermines these incentives. In part this is because firms perceive less benefit in investing in this way, due to the reduced appropriability of their investments. Martins reports that relatively high mark-ups are found in innovation markets. High concentrations may be inevitable due to the high fixed costs:

"...concentrated industries have a higher R&D/ turnover ratio and propensity to patent."¹⁰⁷

There is a balance to be achieved, push R&D and risk reducing allocative efficiency, at least in the short term; or, focus on the short term allocative efficiency gains and risk reducing the scope for investment in R&D, as prices fall to marginal cost. The Commission is explicit:

"Cooperation in R&D may reduce duplicative, unnecessary costs, lead to significant cross fertilisation of ideas and experience and thus result in products and technologies being developed more rapidly than would otherwise be the case. As a general rule, R&D cooperation tends to increase overall R&D activities...

Under certain circumstances, however, R&D agreements may cause competition problems such as restrictive effects on prices, output, innovation, or variety or quality of goods."¹⁰⁸

Once again, the consumer surplus standard normally encourages R&D investments. However, there comes a point where this relationship does not hold and R&D investments may be threatened by increasing competition. The decision about how to balance these positive and negative effects also has both consumer protection and industrial policy implications, see above.

*Internalising externalities*¹⁰⁹

We have seen that different welfare standards (or indeed emphasis within these) can be used to promote different objectives. However, there are many policy objectives that these standards

European Parliament's, *Report of the XIXth Report on Competition Policy 1990*, in Commission, *RCP 1991*, page 223.

¹⁰⁷ Martins (1996), page 71.

¹⁰⁸ Commission, *Horizontal Guidelines*, paragraphs 41 and 43. See also Gual (1995), page 19, "Research joint ventures (RJVs) may be institutional forms that can suitably deal with the contradictions between static (and dynamic) efficiency and appropriability externalities. RJVs allow small firms to undertake R&D investments which otherwise may be beyond their capabilities and may also avoid duplication of R&D. Additionally, RJVs might increase R&D investment by way of internalising at least part of the appropriability externalities... It is often feared, however, that these gains in efficiency can be counteracted by strategic effects which work in the opposite direction. Competition could be reduced in R&D markets, and the same could happen in output markets. Nonetheless, recent work on this topic shows that co-operation both in R&D and the product market can lead to social welfare improvements. In the presence of substantial spillovers, R&D investments increase and, although output is reduced, the overall welfare effect is positive."

¹⁰⁹ For a more detailed analysis, see Nadeau (2003); Pearson (2000) and Petrakis, Sartzetakis, and Xepapadeas (1999).

simply ignore.¹¹⁰ This happens when a specific objective is not included in the parties' pricing decisions. As the Dutch Ministry of Economic Affairs explains:

"External effects occur when an action by one party or a transaction between parties has (positive or negative) consequences for another...who is not directly involved in that action or transaction. An example of a negative external effect is the passing on of the consequences of pollution caused by a production process to the surrounding community. An example of a positive external effect is the transfer of knowledge (education, research and development), which also benefits third parties."¹¹¹

That said, it is often possible to ensure that these extra costs and benefits are internalised by the parties to the agreement. This might be done by providing, for example, an appropriate compensation mechanism so that the parties to the agreement can be forced to compensate third parties for the costs that they have unilaterally imposed upon them. However, this may not always be appropriate.¹¹² In such a case, it may be beneficial¹¹³ for the state to force the parties to the agreement to internalise these other costs.¹¹⁴ Taking environmental protection as an example, we briefly show how this might be done.¹¹⁵

The state concerned could fine companies that emit more than X tonnes of sulphur dioxide each year, for example. One problem with this kind of regulatory solution is that it does not encourage firms to reduce their pollution below X. This is not a problem where the regulation sets the limit at the most efficient point. However, this is difficult to calculate and is likely to change in different industries. Adjusting for these problems would impose significant costs on both the legislator and industry.¹¹⁶

Due to these difficulties, states are increasingly turning to market-based instruments as a supplementary implementation tool. Market-based instruments are generally considered to be both more effective at reducing pollution as well as more efficient.¹¹⁷ Such instruments may include taxing pollution¹¹⁸ and tradable emissions vouchers.¹¹⁹ These force producers to include

¹¹⁰ Pearson (2000), Chapters 2 and 3, explains why this is so for environmental considerations, for example.

¹¹¹ Dutch Ministry of Economic Affairs, *The Liberal Professions*, page 19. See also, pages 19, 41-48, 50-52 and 83.

¹¹² Think, for example, of a situation where the costs imposed by the parties on each 'victim' are so small to that a lawsuit is not a paying proposition, even where cumulatively the costs are large.

¹¹³ Other mechanisms (e.g. class actions) might still be more efficient in this case, see Posner (1998), Chapter 21.

¹¹⁴ Dutch Ministry of Economic Affairs, *The Liberal Professions*, page 51 and Posner (1998), pages 401-403.

¹¹⁵ For a more detailed analysis see Vedder (2003), Chapters 2 and 3; Posner (1998), pages 410-416 and Hahn and Hester (1989), pages 109-153.

¹¹⁶ Posner (1998), pages 410 and 411.

¹¹⁷ Vedder (2003), page 48.

¹¹⁸ Posner (1998), pages 410-416.

¹¹⁹ Posner (1998), page 416 and Hahn and Hester (1989).

all (or at least part) of the environmental cost of production in their price. As a result, demand moves away from environmentally 'costly' goods to those that cause less damage.

In relation to environmental protection, the Commission has said that if environmental considerations are internalised then:¹²⁰

"...competition will quite naturally generate the most efficient allocation of resources possible, by prompting business to reduce costs. This will benefit both the environment and the economy in general."

However, while this is true, as the Commission acknowledged in the next paragraph, the problem is that:

"Commission environmental policy is founded on the 'polluter pays' principle; the effectiveness of the principle depends in particular on the proper operation of the price mechanism, which ought to translate into costs the negative effects of a particular process on the environment, so that prices can perform their signalling function which forms the basis of the market economy."

To the extent that environmental considerations have yet to be properly internalised then the market's price mechanism does not perform its proper signalling function. These Commission statements are more indications of where the Commission would like to be, as opposed to a serious assertion that environmental considerations are fully taken into account by economic efficiency considerations in anything but a minority of cases.¹²¹

Two points need to be made as regards externalities. First, it is not possible to internalise all objectives. This might be because procedurally it is too difficult to price them or there is no agreement over the value of these policy objectives, for example. Secondly, internalising objectives in this way may have implications for other policy objectives. For example, forcing firms to adopt expensive environmental standards may affect their international competitiveness compared to firms from jurisdictions without these obligations. This could undermine industrial policy, for example.¹²² So the decision whether or not to internalise externalities is itself based on a balance between various policy objectives.

2.2.2 'External' influences of the welfare standards

Section 2.2.2. focuses on welfare standards' influence on non-economic policy objectives from an 'external' perspective. It examines two public policy aims: market integration and employment policy and demonstrates that competition can affect these policy goals in both a positive and a negative way.

¹²⁰ Commission, *RCP 1991*, page 54. See also, Commission, *RCP 1993*, paragraphs 163-165.

¹²¹ However, some progress has been made as regards greenhouse gas externalities, see <http://www.euractiv.com/cgi-bin/cgint.exe/1?204&OIDN=1505795>.

Market integration

Market integration is not an objective pursued in many jurisdictions. One exception is Community competition law, which regards market integration as an important objective. The Commission has said:

"The protection of competition is the primary objective of EC competition policy...Market integration is an additional goal..."¹²³

Why is market integration considered so important?

"Such prohibitions [those on exports and imports] jeopardise the freedom of intra-Community trade, which is a fundamental principle of the Treaty, and they prevent the attainment of one of its objectives, namely the creation of a single market."¹²⁴

Chapter Three asks why it is important to achieve the single market. It shows that the Community is rarely explicit and is not consistent in its approach. Waelbroeck believes that the original focus on free movement of goods in the *Spaak Report* was "...a means of increasing competition, which itself was seen as a means of enhancing economic efficiency."¹²⁵ The Commission has recently supported this interpretation in relation to article 81 as well:

"The objective of article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers."¹²⁶

The Commission is certainly right to highlight the link between an open single market and the efficient allocation of resources. However, an economic welfare approach will not always promote market integration as pursued in the Community. Motta provides a welfare analysis of a firm seeking to price discriminate between different Member States. He shows that:

¹²² Scholz and Stähler (1999). Energy policy, for example, may also be affected, Bouterse (1994), pages 34 and 35.

¹²³ Commission, *Vertical Guidelines*, paragraph 7.

¹²⁴ Joined Cases 100-103/80 *SA Musique Diffusion Française and Others v. Commission* [1983], paragraph 107. See also, Commission, *RCP 1994*, paragraph 10; Commission, *RCP 1992*, paragraph 2; Commission, *RCP 1991*, page 15 and Commission, *RCP 1990*, page 11.

¹²⁵ Waelbroeck (1987), page 302.

¹²⁶ Commission, *Article 81(3) Guidelines*, paragraph 13. See also, Schaub (2002), page 38; Commission, *Vertical Guidelines*, paragraph 7; CES, *Green Paper on vertical restraints*, paragraph 1.2 and Commission, *RCP 1992*, paragraph 2. The Commission has used economic efficiency as a justification, as well as economic freedom and consumer protection, see Chapter Three. This chapter assumes that market integration is there to increase economic efficiency. To the extent that this is not the case, the welfare test is even less likely to consistently achieve the relevant objective. In relation to consumer protection, for example, see below.

"...a *per se* rule, which forbids firms to price discriminate across countries is not justified on economic welfare grounds, and in some circumstances might even work (paradoxically) against the objective of market integration."¹²⁷

Employment policy

Some also argue that pursuing economic efficiency will help achieve the Community employment policy and through this increase economic and social cohesion.¹²⁸ The Commission has said:¹²⁹

"Competition policy can contribute to the success of an overall employment policy. Through its effect on the structure of markets, it directly influences the competitiveness of the European economy and its rate of growth and hence helps to orient the Union's macroeconomic framework towards employment. The Commission's endeavours through its competition policy to open up markets in the Union are making a major contribution to the completion of the single market, that guarantee of more trade and faster growth... The general strengthening of the competitiveness of our economy is supporting growth and employment. The liberalisation process generates rivalry among businesses looking for new products and services, an effect which is likely to stimulate job creation and consumer demand. The Commission's policy on the opening-up of such markets to competition will thus ultimately have a favourable impact on employment."

In the next paragraph, however, the Commission clarified that the pursuit of economic efficiency does not always increase employment *in the short term*:

"Of course, more competition also leads to restructuring, with the weakest going to the wall, which inevitably results in the short term in plant closures and job losses. In such circumstances there can be no getting away from the fact that measures to promote competitiveness are in some cases, at least in the short run, job-destroying."

The pursuit of economic efficiency should lead to higher employment rates in the long term. That said, in the short term, it might destroy jobs. What is the appropriate response? US antitrust rules were implemented more leniently during the Great Depression. The idea being that price agreements would help firms to avoid bankruptcy, easing social tensions caused by unemployment. It is unclear whether this policy reduced unemployment.¹³⁰

¹²⁷ Motta (2004), page 23. See also his Chapter 7; Bishop and Walker (2002) paragraph 1.04 and following; Korah (2000) page 13; Neven, Papandropoulos and Seabright (1998), pages 20, 37 and 38; Neven (1998), pages 8 and 118 and Korah (1986), page 91. These economic arguments apply equally in the long-term. For a contrary (unsupported) view, see Ehlermann (1998), page x.

¹²⁸ CES, *Green Paper on vertical restraints*, paragraph 1.2., cited above and Commission's reply to the European Parliament's, *Report of the XIXth Report on Competition Policy 1990*, in Commission, *RCP 1991*, pages 223 and 224.

¹²⁹ Commission, *RCP 1997*, page 8-9. See also, Commissioner Monti who has said "...in many industries competition is one of the main drivers of innovation and job creation.", Mario Monti (2002a), page 9; Commission, *RCP 1999*, page 7; van Miert (1999), pages 1 and 5; Massey (1996), pages 93-95 and Commission, *RCP 1994*, page 3.

¹³⁰ Motta (2004), pages 26 and 27.

That said, many advocate ameliorating the short-term negative employment effects with specific employment policies that might restrict competition. When he was the Commissioner for DG Competition, van Miert said:¹³¹

"Beyond growth-based solutions, to which competition policy can actively contribute, a social response must be found to these short-term effects because, as Mr Santer has said, Europe cannot be just an economic project. I am a firm believer in the social dialogue: not only does it meet human needs, but it fits in with a new way of thinking about economic efficiency."

2.3 Conclusion of Section 2

Competition policy and the welfare standards which support it are based on value premises. As such, it is a normal policy tool. When it conflicts with other policy objectives these conflicts must be dealt with and not simply ignored. Competition policy should not be imbued with some special status, protecting it from intervention, whenever it conflicts with other policies.

Consumer welfare is an extremely important goal that can help us achieve many public policy objectives. It can also undermine them due to market failures. However, the existence of a market failure is not the end of the story. Efforts to resolve these failures may cause other unforeseen (and potentially greater) costs. This may lead to important welfare reductions. Section 3 discusses the pros and cons of balancing competing goals with the consumer welfare standard.

3. WHEN MIGHT IT BE APPROPRIATE FOR COMPETITION POLICY TO CONSIDER NON-WELFARE OBJECTIVES?

3.1 Introduction

Consumer surplus, producer surplus and total surplus are not value-neutral, see above. Furthermore, consumer welfare can promote, as well as undermine, other public policy goals.¹³² Therefore, it might sometimes be appropriate to account for consumer welfare's effect on other policy objectives within competition policy. Section 3 asks two questions in this regard:

- Should competition policy take account of other public policy objectives? And;
- If the answer to the last question is 'yes', *when* should it take account of these other public policy objectives?

Areeda and Hovenkamp argue against the consideration of policy objectives (other than consumer welfare) within US antitrust law:

¹³¹ Commission, *RCP 1997*, page 9.

¹³² The same is true of other policy objectives. For instance, certain measures taken to protect the environment may themselves distort competition, Case C-300/89 *Commission v. Council* [1991], paragraph 23 and OECD (2003), page 3.

"As a matter of *general* legislative policy, competition is hardly foundational, and government may often wish to intervene to mitigate its harsher effects. But antitrust's purpose is to see to it that competition is promoted whatever its collateral consequences, not to make legislative judgments about when relief from the excesses of competition is appropriate."¹³³

Contrast this with the position adopted by Canada in its *Competition Act 1986*, cited in the Chapter One's Introduction, the objectives of which are myriad. A report by the OECD's Secretariat said that, in most countries considered, the objectives of competition policy was:

"...to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants. Competition has been generally viewed to achieve or preserve a number of other objectives as well..."¹³⁴

Section 3's two questions are dealt with simultaneously because they are intertwined. The structure of the discussion is as follows: Section 3.2. outlines procedures for 'resolving' conflicts. There are essentially two: exclusion (as emphasised by Areeda and Hovenkamp in the US framework) and compromise (as we saw in Canada's competition act). Then, Section 3.3. considers the pros and cons of exclusion in more detail. Section 3.4. does the same for compromise. In light of this discussion, Section 3.5. answers the two questions posed above and concludes.

The answers to these two questions provide a valuable theoretical framework for the discussion of antitrust's objectives. We cannot discuss the substantive antitrust rules until we understand the objectives that should guide our decisions. That said, theoretical frameworks cannot be used in isolation but must be applied to a specific legal system. In relation to Community competition policy this is discussed again in Part C of this thesis, which debates how best to account for other policies within antitrust.

3.2 Exclusion v. compromise

Imagine that two public policy objectives, A and B, pursued in a certain country, conflict. What is meant by 'conflict'? Conflicts manifest themselves in two ways:

- *only one of A or B can be achieved at the same time.* The choice is between achieving objective A and not achieving objective B at all, or vice versa. The conflict then becomes a question of *which* of these two policy objectives should be sacrificed. We call these first order conflicts; or

¹³³ Areeda and Hovenkamp (2000), paragraph 100b. Others have made the same point, see, for example, Buigues, Jacquemin and Sapir (1995a), page xxii.

¹³⁴ OECD (2003), page 2. See also, South African submission to OECD (2003), pages 5-7 and Shyam Khemani (2002), page 11.

- *it is possible to achieve some of A and some of B, but not all of both.* The conflict then becomes a question of *how much* of these two policy objectives should be maximised.¹³⁵

We call these second order conflicts.

First order conflicts rarely arise in practice. They are not relevant to the discussion in this thesis, because all of the objectives discussed here are divisible.¹³⁶ When this thesis refers to conflicts it is referring to second order conflicts, unless it expressly states otherwise.

There are two ways of dealing with conflicts. We could balance objectives A and B *within* the implementing provisions, whenever they conflict. One objective might have more weight than the other in this balance, but nevertheless, to some degree, both factors would be considered. Through this balance we arrive at a compromise. The decision-maker could balance both consumer welfare and other relevant policy aims when applying competition law.

Compromise is complex. The outcomes of compromise are hard to predict. The resulting lack of legal certainty discourages innovation and investment. The more competing objectives that need to be considered when an implementing provision is applied, the more complex this exercise becomes. The benefit is that this approach provides the possibility of a perfect balance in every case, which this thesis calls the "optimal balance".¹³⁷

Another conflict resolution strategy is to allow one of the objectives to exclude (or trump) the other. This means that, for example, whenever objective A and B conflict we only take account of one of them. When applied to competition laws, this would mean that the law would be applied solely in order to achieve, for example, consumer welfare. This would be so even where consumer welfare undermined other goals, such as environmental policy.

Exclusion is drastic. The pursuit of consumer welfare might seriously undermine environmental considerations in a specific case, and yet this is considered irrelevant when applying competition law and sometimes outside of this too. Exclusion has the advantage of clarity and is favoured by those who see competition law as an end in itself.

Sometimes both compromise and exclusion interact. For example, when deciding whether to allow objective A or B to exclude the other, one has to balance their importance to a certain

¹³⁵ A similar situation occurs where objectives A and B do not themselves conflict, but where they cannot both be fully achieved for some other reason, for example, due to our limited resources. This type of 'conflict' is included in our second order conflict definition.

¹³⁶ Chapter Eight briefly discusses this issue.

¹³⁷ The 'optimal' or 'perfect' balance is an *end result*; as opposed to mere and market-balancing which are *processes*. Obviously, the 'optimal balance' can never be 'found', because there is a knowledge problem. So references in this thesis to 'achieving the optimal balance' should be read as getting as close to this as is possible with the resources and knowledge available to the decision-maker.

extent. Nonetheless, the two approaches are distinct. Balancing in this sense is not the same as compromise.

Conflicts between welfare maximisation and other public policy objectives can be resolved in other ways. For example, externalities may be internalised. This might be done in relation to environmental policy, for example, see above.¹³⁸ A second method for dealing with conflicts is to use legislative tools outside of competition policy.¹³⁹ This might mean, for example, giving financial or other aid to those that act in a certain way, or penalising those that do not. These 'incentives' can be used to achieve other policy aims.¹⁴⁰ Some of the benefits of doing this rather than distorting competition are discussed below. However, such intervention is not always possible and it can undermine the competitive process.

3.3 Exclusion

Section 3.3. discusses the pros and cons of exclusion as a means of resolving second order conflicts. Section 3.3.1. considers three purported advantages of exclusion: it encourages more efficient agreements; it enhances legal certainty; and, it assists the convergence of competition policy objectives worldwide. Then, Section 3.3.2. analyses exclusion's negative side. States increasingly encourage corporate social responsibility to achieve public policy ends. Exclusion undermines this effort as well as the achievement of the optimal balance.

3.3.1 The pros of exclusion

Restricting competition policy's goal to the welfare objective purportedly encourages more efficient agreements. Appreciable agreements between undertakings are assessed under a pure consumer welfare test. Only those that enhance this goal are allowed. So, firms have an incentive to enhance consumer welfare, or at least not to reduce it, in their agreements.

That said, does excluding public policy objectives from the competition assessment increase efficiency *overall*? The OECD Secretariat has said that the inclusion of multiple objectives within competition law increases the risk of conflicts.¹⁴¹ Is this correct? Imagine that only two

¹³⁸ There is some slight of hand here. Where externalities are internalised, a conflict still exists, but it is resolved within the very mechanism for defining welfare and so it may appear as if no conflict remains.

¹³⁹ Areeda and Hovenkamp (2000), paragraph 100b, cited above, advocate this approach. The European Union accepts this as a method. The application of national competition law "...may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of article 81(1) of the Treaty, or which fulfill the conditions of article 81(3) of the Treaty...", article 3(2) of Regulation 1/2003. However, article 3(3) of the same regulation continues that, without prejudice to general principles and other provisions of Community law, this does not preclude "...the application of provisions of national law that predominantly pursue an objective different from that pursued by articles 81 and 82 of the Treaty." The full effect of this provision remains to be seen.

¹⁴⁰ The State aid provisions aim to do this, see articles 87-89 of the Treaty.

¹⁴¹ OECD (2003), page 2.

objectives (consumer welfare and environmental protection) are relevant. Exclusion means that the environmental considerations are ignored *in the competition assessment*. However, where exclusion operates it is likely that environmental considerations will be pursued through, for example, specific environmental legislation.¹⁴² Therefore, firms must still ensure that their agreement complies with *both* the environmental and the competition rules. As a result, exclusion does not necessarily enhance efficiency *overall*.¹⁴³ In fact, it might be more efficient to deal with these issues in an integrated way, see below.

Exclusion enhances legal certainty.¹⁴⁴ Legal certainty is important¹⁴⁵ for two main reasons.¹⁴⁶ First, uncertainty is the enemy of business.¹⁴⁷ It is vital that undertakings are aware of the legal framework within which they operate.¹⁴⁸ This allows them to better plan their affairs. Reducing the certainty/ predictability of a competition assessment "...increases the risk that firms may be breaking the law when they have been trying in good faith to abide by it."¹⁴⁹ The legal consequences of breaching the competition provisions can be severe.¹⁵⁰ Firms' innovation and investment decisions involve business risks. They are less likely to accept these business risks in the presence of further legal risks with large sanctions.¹⁵¹ Enhancing legal certainty reduces the legal risks, facilitating innovation and investment.¹⁵² Legal certainty also reduces administrative costs and the costs imposed awaiting legal advice.¹⁵³ Secondly, competition policy will only

¹⁴² If they are not, then environmental protection is completely ignored. This means less conflicts and more efficient agreements; however, this comes at the cost of jeopardising this policy objective, see below.

¹⁴³ Although, it might still do so where the most efficient instrument is used, Section 3.4.2.

¹⁴⁴ Areeda and Turner (1978), paragraph 105.

¹⁴⁵ The importance of this may change due to the procedural mechanism in different jurisdictions. The shift from a system of ex ante administrative exemption in the Community on 1 May 2004, for example, theoretically increases the importance of legal certainty for undertakings now that the certainty provided by a Commission decision (admittedly it was rare to get one) cannot be relied upon.

¹⁴⁶ Regulation 1/2003, recitals 21, 22 and 38 and article 16; Commission, *Guidance Letters Guidelines*, paragraphs 1 and 2 and COM(90) 556, page 1. The Community Courts have repeatedly underlined the importance of legal certainty, see, for example, Case T-51/89, *Tetra Pak v. Commission* [1990], paragraph 36, and the cases referred to there.

¹⁴⁷ Holmes (2000), page 79, citing Jacques Bougie, Chief Executive Officer, Alcan Aluminium Limited.

¹⁴⁸ Edward (2002), page 129; Commission, *RCP 1993*, page 52 and Schaub (1996), page 79.

¹⁴⁹ Neven, Papandropoulos and Seabright (1998), pages 18 and 19. See also, Bell (1983), page 26.

¹⁵⁰ In relation to contracts governed by English law, for example, see Whish (2003), page 291 and 292. In relation to the financial penalties that can be imposed see Regulation 1/2003, Chapter VI.

¹⁵¹ Jenny (1993), page 186 and Coarse (1960).

¹⁵² Regulation 1/2003, recital 38.

¹⁵³ Neven, Papandropoulos and Seabright (1998), page 19. These can be important, although they are small in relation to the benefits to the economy of competition policy, Gardner (2000). The smaller they are the better, provided that this is not achieved at the expense of an even larger loss to society as a whole, COM(96) 721, paragraph 86. For a brief indication of some business costs related to possible changes in the UK competition regime see, DTI (2002), pages 13-15. For other benefits of legal certainty see, Jebsen and Stevens (1995-6), pages 450 and 460 and Scalia (1989), page 1179.

receive the support of business, policy-makers and the general public when they understand it.¹⁵⁴ Without the support of these actors competition policy cannot be effective;¹⁵⁵ in which case the efficiency benefits that competition policy delivers are less likely to be achieved.¹⁵⁶

Does exclusion really enhance legal certainty? Exclusion ensures that there is only one consideration *in the competition law*, consumer welfare.¹⁵⁷ Where the competition rules are unclear, undertakings need only be guided by one over-arching objective, consumer welfare. They do not have to assess whether the agreement's welfare benefits outweigh other public policy goals. Predicting the balance between two objectives within one policy instrument is difficult, see Chapter Eight. So, legal certainty, in relation to the competition provisions, increases. Assume now that the other relevant policy objective is environmental policy. If this were pursued using legislation with a 'pure' environmental goal then, in cases of ambiguity within that rule, predicting the outcome of the decision would be easier too. It may be difficult for firms to ensure that their agreement complies with both the competition provisions and the environmental rules, but they do not have to balance the two objectives themselves.¹⁵⁸ As a result, legal certainty is enhanced *overall*.¹⁵⁹

Finally, exclusion reduces firms' compliance costs. This is particularly important as more jurisdictions adopt competition laws.¹⁶⁰ Antitrust laws increasingly emphasise consumer welfare, rather than other public policy goals, see above. As these rules harmonise across the globe, compliance costs decrease.¹⁶¹ Why? Where a contract triggers competition laws' jurisdictional tests in multiple jurisdictions, transactions are cheaper if the competition assessment is similar in all of them.¹⁶² Fewer lawyers are needed both before and after the transaction.¹⁶³ Furthermore, as competition law converges transactional delays and uncertainty

¹⁵⁴ Commission, *RCP 1993*, page 103.

¹⁵⁵ Commission, *RCP 2002*, pages 20-22; Commission, *RCP 1992*, page 15 and Commission, *RCP 1991*, pages 11 and 57.

¹⁵⁶ Commission, *RCP 2001*, page 5.

¹⁵⁷ That is not to say that the consumer welfare standard is easy to apply. We saw above that this is not the case. See also, Amato (1997), page 123 and Jebson and Stevens (1995-96), page 460.

¹⁵⁸ Hopefully the public authorities balanced these two objectives when they enacted both sets of rules.

¹⁵⁹ Amato (1997), pages 122 and 123 and Jacobs (1993/2), page 44.

¹⁶⁰ Calvani (2003), page 415; Whish (2003), page 1 and Dabbah (2003), pages 1 and 2.

¹⁶¹ Calvani (2003), page 415. See Dabbah (2003), pages 4-6 and the references made there, for other benefits of convergence.

¹⁶² Value judgments are still needed when implementing a pure consumer welfare model, see above. So, the various jurisdictions may interpret an agreement's anti-competitive effects differently even when they try to achieve the same objective.

¹⁶³ By way of example, in its proposed merger with Honeywell, General Electric had to notify the merger in over ten jurisdictions. The substantive legal tests were different in many of these.

are reduced,¹⁶⁴ making agreement easier to attain. This aids the development of international commerce.¹⁶⁵

That said, how much difference does 'exclusion' make towards the reduction of costs? The aforementioned benefits apply to the competition assessment. However, as noted above, if, for example, there is no room for environmental considerations in the competition assessment, states are likely to implement specific environmental laws. Firms must comply with these rules in the relevant jurisdictions too.¹⁶⁶ This implies that exclusion may have little impact on cost reduction. That said, competition authorities are particularly renowned for their attempts to extend the extra-jurisdictional reach of competition law.¹⁶⁷ Excluding environmental considerations from the competition analysis may, in fact, reduce firms' compliance costs overall, simply because competition laws often have a larger jurisdictional reach than their environmental counter-parts.

3.3.2 The cons of exclusion

Compromise can achieve an optimal balance between policies in every case, although reducing legal certainty carries a cost. Under exclusion, potentially important policy objectives are completely ignored. Even where they are protected with other legislation, the balance between different policy objectives is less likely to be optimal, see Section 3.4.3. and, in practice, where different policies are implemented independently insufficient attention is paid to their impact on other relevant policy objectives.

A second disadvantage of exclusion is that it limits access to an important policy tool. Many states increasingly emphasise corporate social responsibility (CSR). CSR encourages companies, on a voluntary basis, to integrate social and environmental concerns in their business operations and in their interaction with their stakeholders.¹⁶⁸

The move towards CSR is driven by citizens, consumers, public authorities, investors and companies themselves in response to the damage caused by economic activity to the environment and the fabric of society.¹⁶⁹ Take the Community, for example, the Commission considers CSR fundamentally important:

¹⁶⁴ COM(2001) 745, paragraph 160.

¹⁶⁵ Kaczorowska (2000), page 124 and Jenny (1998), page 29.

¹⁶⁶ This problem would be reduced if environmental protection (and other relevant) requirements were harmonised across the globe as well. However, there is less impetus for this than for the harmonisation of competition laws.

¹⁶⁷ See, for example, Dubbah (2003), Chapter 7; Whish (2003), Chapter 12 and Goyder (2003), Chapter 23.

¹⁶⁸ COM(2002) 347, page 5 and COM(2001) 366, paragraphs 8 and 20-26.

¹⁶⁹ COM(2002) 347, page 6 and COM(2001) 366, paragraph 10.

"CSR can...make a contribution to achieving the strategic goal of becoming, by 2010, "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion" adopted by the Lisbon Summit of March 2000..."¹⁷⁰

CSR is promoted throughout the Community even though both the Council and the Commission recognise that it undermines economic efficiency:

"Its objective is to ensure a balanced approach to sustainable development, which maximises synergies between economic, social and environmental dimensions."¹⁷¹

Both Institutions accept the need to integrate CSR into other Community (and Member State) policies to further the awareness, dissemination and adoption of such practices.¹⁷² This should include competition policy. The Commission has called this integrated approach "...the lynch pin in the process of establishing sustainable social and economic development patterns."¹⁷³

Both the Commission and the Council recognise the need for firms to work together to better meet shared CSR objectives.¹⁷⁴ The Commission believes that co-operation agreements have three main advantages over legislation:

"They can promote a pro-active attitude on the part of industry, they can provide cost-effective, tailor-made solutions and allow for a quicker and smoother achievement of objectives."¹⁷⁵

The Council and the Commission agree that firms must work together to balance economic, social and environmental interests. This co-operation can achieve better, 'tailor-made' solutions more quickly and cheaply than legislation. Yet, if the Community refuses to take environmental and social factors into account in Community competition policy, the drive for CSR will be undermined. This is because undertakings risk fines for including CSR criteria in appreciable agreements under the competition rules where this undermines consumer welfare. This is particularly ironic when both the Council and the Commission expressly accept that welfare is often undermined through CSR and yet still advocate its use. Undermining consumer welfare is

¹⁷⁰ COM(2002) 347, page 3. See also, Council, *on CSR*, pages 3 and 4; COM(2002) 347, pages 4, 7 and 8 and COM(2001) 366, paragraphs 2, 6, 9 and 13-19. See, <http://www.euractiv.com/cgi-bin/cgint.exe?204&OIDN=2000470&-tt=cs> for a list of recent Community CSR initiatives.

¹⁷¹ COM(2002) 347, page 20. See also, Council, *on CSR*, page 3 and Grimeaud (2000), page 209. It is also there because the Commission believes in 'shared responsibilities', see Gyselen (1994), pages 244 and 245.

¹⁷² Council, *on CSR*, pages 3 and 4 and COM(2002) 347, pages 7, 8, 18 and 19 and Grimeaud (2000), page 209.

¹⁷³ Cited in Baldock (1992), page 1.

¹⁷⁴ Council, *on CSR*, page 4; COM(2002) 347, pages 10, 12 and 17; COM(2001) 366, paragraphs 42-60 and COM(96) 561. This is supported by other academic work too, see, Bouterse (1994), page 40, and references made there and Jacobs (1993/2), page 43.

¹⁷⁵ COM(96) 561, page 3. See also, OECD (2003a), pages 3, 4, 15 and 62.

not always justified by CSR objectives; however, sometimes it is, even where the welfare effects are appreciable. Exclusion means it must always be ignored.

3.3.3 Conclusion of Section 3.3.

Exclusion increases legal certainty and can help reduce firms' compliance costs. That said, the importance of these effects should not be exaggerated. Many of the problems that are overcome by providing greater clarity in competition law through exclusion are not eliminated, they are merely transferred elsewhere. Furthermore, exclusion robs us of an important policy tool. CSR is invaluable in achieving a balanced and sustainable development of economic activities, article 2 of the Treaty, maximising synergies between economic, social and environmental dimensions.

3.4 Compromise

Section 3.4. considers the advantages and disadvantages of compromise. Section 3.4.1. focuses on the benefits of achieving the optimal balance. Section 3.4.2. discusses a 'disadvantage' of compromise by highlighting the benefits of using the optimal policy instrument.

3.4.1 The pros of compromise

When compromise takes place within the competition analysis of a specific agreement, the decision-maker considers consumer welfare as well as other relevant policy objectives. He or she can ensure that the optimal balance between conflicting goals is achieved in the specific case in question. In contrast, where non-economic public policy considerations are excluded from the competition law analysis they are ignored. This means that public policy objectives, potentially of great significance, think of national security or environmental protection, could be jeopardised.

The benefits of compromise can be great, see the discussion about CSR above. Yet, balancing in every case is not ideal. Why not? Sometimes it is difficult to balance the relevant objectives and to predict the optimal balance.¹⁷⁶ This uncertainty has a cost, see above. This is an important objection but it should not be over-stated. Predictability is not a legal system's only value, the 'right' decision is important too. Where the advantages of considering the non-welfare objective within competition policy are small, then the benefits of legal certainty may make exclusion preferable.¹⁷⁷ However, rather than entirely rejecting compromise we should overcome this specific objection. One way of doing this is through the appreciability doctrine.¹⁷⁸ This allows

¹⁷⁶ COM(1999) 587, points 17-21 and Amato (1997), page 118. Chapter Eight suggests some ways of increasing the facility and the predictability of compromise as a process.

¹⁷⁷ Jacobs (1992/3), page 44.

¹⁷⁸ Another idea is to only integrate policies in major legislative proposals. This was suggested with environmental impact assessments, for example, Commission, *From Cardiff to Helsinki*, page 5. Major pieces of legislation are likely to have a large impact in many policy areas, justifying the cost of conducting the impact assessment. That

us to ignore objectives that the agreement affects in a non-material way. Chapter Eight develops this idea.¹⁷⁹

Another issue is that compromise allows the decision-maker to adopt a seamless approach to legislation. If this were not the case then the legislator would not be neutral vis-à-vis the different regulatory or legislative techniques which States choose to pursue various policies. Neutrality of this sort has many advantages.¹⁸⁰

3.4.2 The cons of compromise

Compromise allows the decision-maker to achieve the perfect policy balance in competition cases,¹⁸¹ although sometimes we might temper this with an appreciability doctrine. That said, delegation theory tells us that the objectives assigned to a competition law might be more completely achieved if drawn narrowly.¹⁸² As a result, a potential downside of compromise is that it may mean that none of the conflicting objectives are satisfactorily achieved. This may be worse than adequately achieving one of them, even where the other is ignored.

Furthermore, commentators often argue that many non-economic objectives are applied arbitrarily and subjectively.¹⁸³ Why contaminate the competition policy's welfare calculations with such goals?¹⁸⁴ This is not so much an argument against compromise, but against the consideration of non-economic objectives.¹⁸⁵ Taken to an extreme this would mean that many such objectives could never be implemented. True, the inclusion of these goals can undermine legal certainty. But this is not the legal system's only objective. Anyway, it is not as if welfare standards can be applied objectively either. A better response to these issues, rather than sidelining non-economic policies, may be to find more predictable and objective ways of applying them, see Chapter Eight.

said, while decisions in competition cases are not major pieces of legislation they can have considerable effect due to their value as precedents for other decisions. As a result, this 'solution' may be less helpful in our area.

¹⁷⁹ This might be combined with the promotion of these non-welfare objectives through other legislative provisions.

¹⁸⁰ These are outlined in Gyselen (1994), pages 245-246, 250-252, 256 and 257.

¹⁸¹ As mentioned above, there is a knowledge problem and so the 'optimal balance' can never be perfectly achieved. However, I mean that compromise allows the decision-maker to approach this, in the sense that the test would *allow* it (i.e. even if this is impossible to *ensure*).

¹⁸² Neven (1998), page 8.

¹⁸³ Schaub (1998), page 126 and Hawk (1998), page 355. The World Bank and OECD (1999), page 1, notes the same argument.

¹⁸⁴ Hovenkamp (1998), page 421 and Areeda and Turner (1978), paragraph 109a. There is another set of arguments that do not rule out the presence of non-economic arguments in competition policy but say that the subjective nature of judgments involved with these objectives should affect the institutional structure of the decision-making body, see Ehlermann (2001) and Ehlermann (1998), for example. In the Introduction I explain why I do not discuss this issue.

Finally, there is another issue that impacts upon our assessment, is compromise the best way of achieving the optimal balance? The answer is not always positive. Why? Economists rank different policy instruments (such as subsidies, taxes and tariffs) according to how efficiently they achieve non-economic objectives.¹⁸⁶ The instruments are ranked by their relative costs. Costs arise due to the distortions that the instruments introduce into the economy. As a general proposition:

"...the optimal (or least-cost) method of doing this is to choose that policy intervention that creates the distortion affecting directly the constrained variable."¹⁸⁷

Distorting or restricting competition to realize specific non-economic objectives is normally an inefficient way of achieving the end in question.¹⁸⁸ It can be costly¹⁸⁹ and is sometimes ineffective.¹⁹⁰ Economists advocate the use of optimal policy instruments; the best one to use depends on the non-economic factor being pursued.¹⁹¹ As Motta explains:¹⁹²

"This does not imply that objectives or public policy considerations other than economic efficiency are not important, but simply that if a government wanted to achieve them, it should not use competition policy but resort to policy instruments that distort competition as little as possible."

As a starting point this is eminently sensible. That said, sometimes, certain ends could best be achieved by undermining competition. Three are mentioned here and they are: (a) no alternative; (b) jurisdictional issues; and, (c) short term benefits. First, objectives such as fairness, social cohesion and the protection of political democracy may require restrictions of competition if they are to be achieved.¹⁹³ Even where this is not the case, as mentioned in the

¹⁸⁵ Although the related issue of commensurability is discussed in Chapter Eight.

¹⁸⁶ Bhagwati (1971) and Srinivasan (1996) and the references made there. There is even evidence that Adam Smith did this, see Elmslie (2004).

¹⁸⁷ Bhagwati (1971), page 77.

¹⁸⁸ Areeda and Turner (1978), paragraph 105, argue that considering non-economic objectives would "...involve the courts in essentially political decisions for which there are no workable legal standards, and would often place them in a regulatory or supervisory role for which they are ill-equipped." It is difficult to balance non-economic objectives. The absence of workable legal standards is certainly a handicap, Chapter Eight suggests a framework. However, the reference to 'political decisions' is disingenuous because: (i) political decisions are made even within a 'pure' economic framework; and (ii) courts regularly make political decisions, for example, Member States' courts balance articles 28 and 30 of the Treaty and Bell (1983), Chapters I, II, V and X.

¹⁸⁹ Dutch Ministry of Economic Affairs, *The Liberal Professions*, pages 23, 46-48, 50, 67-69 and 81-91; Ahdar (2002), page 348; Hovenkamp (2002), page 4; Jenny (1993), pages 218-219; Areeda & Turner (1978), paragraph 105. Elzinga (1977), pages 1195 and 1196 and Williamson (1969), pages 105-118.

¹⁹⁰ OECD (2003), page 4; Motta (2003), sections 1.3.1. and 1.3.2. and Faull (1998), page 12.

¹⁹¹ Motta (2004), page 18; Ahdar (2002), pages 342, 343 and 347; Townley (2002) and Bhagwati (1971), pages 78-81, which discuss more efficient ways of achieving various policy goals than distorting competition.

¹⁹² Motta (2003), page 30.

¹⁹³ Jenny (2000), page 24. Also see, Bouterse (1994), page 62.

discussion on CSR above, agreements sometimes allow a particular goal to be achieved more effectively, cheaply and completely than legislation.¹⁹⁴ They may also be preferred as they are better at raising awareness on particular issues and changing behaviour in general.¹⁹⁵ CSR received strong European Union backing because time is of the essence in dealing with many social and environmental problems.¹⁹⁶ Sometimes compromise is even the most efficient policy. Gual writes that:

"Imposing the cohesion restriction [article 159 of the Treaty's policy linking clause, see Chapter Two] might lead to the choice of non-optimal policies in trade and competition, protecting or subsidising a particular industry on the grounds of cohesion. Nevertheless, the optimality of the free-market adjustment can also be disputed. In the presence of market imperfections (for example, imperfect foresight) and/or externalities (geographically-based pecuniary externalities), adjustment support could be justified on efficiency grounds, without having to resort to distributive considerations which are best left to strict redistribution (cohesion) policies."¹⁹⁷

That said, prudence is needed here. Economic history teaches us that government failures are more important and more frequent than market failure. Intervention in this manner should be exercised with caution.¹⁹⁸

A second, admittedly rarer, issue is that a jurisdiction may not have the legal capability to achieve the ends by other means.¹⁹⁹ For example, in the European Union certain matters are reserved to the exclusive competence of the Member States. If the Community were obliged to take account of Treaty objectives in areas of exclusive Member State competence (such as culture) then it might only be able to do this by distorting competition.²⁰⁰ This argument may seem unconvincing at first.²⁰¹ Jurisdictional obstacles are often there to check uninhibited

¹⁹⁴ COM(2001) 486, pages 16 and 17; Grimeaud (2000), pages 212-215; Commission, *From Cardiff to Helsinki*, page 2; COM(96) 561, page 3; Bouterse (1994), page 74; Jacobs (1993/2), page 43 and Baldock (1992), pages 2-4 and 18 and European Parliament Resolution A3-0170/92.

¹⁹⁵ A point made in relation to voluntary environmental agreements sometimes, OECD (2003a), pages 10, 18 and 50.

¹⁹⁶ Public choice theory also highlights power and motivational difficulties that a state might face if it were to try to achieve environmental or other policy goals through alternative legislative tools. Explicitly it refers to the problems of 'capture', see Petersmann (2003), page 52, and the references made there. Section 3 also discussed other rent-seeking behaviour issues. It is unclear whether these issues are best solved by compromise within competition law (which might also be tainted by 'capture') or by resolving the issue of capture at a more fundamental level, see Petersmann (2003), page 52 and following.

¹⁹⁷ Gual (1995), page 39. see also, Sandmo (2000), pages 11-19.

¹⁹⁸ Mavroidis (1995), page 120.

¹⁹⁹ Even where the Community has the relevant competence, it has not always been given the appropriate tools to achieve the objective in the most efficient way possible, Gual (1995), page 39.

²⁰⁰ On this point and others like it, see also; Ariño (2004), page 20; Jacobs (1993/2), pages 41 and 42 and Baldock (1992), page 18, attempt to overcome perceived procedural 'problems'.

²⁰¹ In a similar vein, Vogelaar (1994), page 546, argues that voluntary environmental agreements are beneficial because legislating often demands political compromise, which often makes legislation less effective. However, this

competence. It may be more appropriate to change the competence (if this were considered necessary) as opposed to changing the substance of the legal provision.²⁰² That said, imposing a duty on the Commission to consider, for example, cultural policy when applying the competition rules would limit its ability to undermine this policy area which the Member States have intentionally reserved to themselves.²⁰³ Rather than taking affirmative action in a reserved area, the Community would be recognising a Member State interest.²⁰⁴ This could have significant benefits otherwise the Member States may ignore the need for competition in their cultural legislation and the Commission may ignore cultural benefits in its competition decisions.²⁰⁵

Finally, although an objective could, theoretically, be achieved more efficiently using another policy instrument, there might be practical reasons (at least in the short term) why distorting competition is the best way of achieving certain ends at a given moment in time. For example, there may be political obstacles to agreeing specific environmental legislation such as a lack of time in the legislative programme, even where a measure has universal support. As we saw above in the CSR discussion, agreements between undertakings may achieve a given level of, for example, environmental protection, more quickly than could be achieved by legislating.²⁰⁶ It may be acceptable to allow compromise in these areas until appropriate legislation is enacted.²⁰⁷ This issue is discussed further in Chapter Seven, in a Community context.

Even where these arguments apply, one should critically examine arguments that undermine competition to achieve policy ends to see whether they could be achieved more efficiently in a different way within the required timeframe and given the powers of the specific decision-

is one of the costs of democratic institutions and it is not a convincing justification for ignoring the legislature, in my view.

²⁰² Monti (2002), page 1092, notes the argument that the "...increase in Community policies in achieving other Treaty objectives directly...mean that the need for competition law to be deployed indirectly to achieve other Treaty aims is gone." This is only true if the Community now has all the powers needed to achieve all relevant objectives. This is not the case, see, Chapter Seven.

²⁰³ Cunningham (2001), pages 136 and 137.

²⁰⁴ Such a mechanism is necessary if Member States are to reserve certain policy areas to themselves. Cunningham (2001) also argues that it is in line with subsidiarity, page 161.

²⁰⁵ It is likely that clarity and consistency increase where a single body is able to reconcile different policy objectives, Buigues, Jacquemin and Sapir (1995a), page xvii.

²⁰⁶ This might create a moral hazard problem. This means that if the legislator sees that the courts (or the Commission) deal with these difficult balances effectively then they may see even less need to face difficult, controversial and unpopular compromises in the future. This may lead to even more uncertainty in the long run. That said, legislators are unlikely to forego the considerable power that this moral hazard implies for long.

²⁰⁷ The Commission has suggested this approach, for example, see, SEC(92) 1986, page 6.

making body.²⁰⁸ The choice of undermining competition to achieve other objectives must be clear and adequately justified.²⁰⁹

3.4.3 Conclusion of Section 3.4.

There are two ways of balancing consumer welfare and non-economic policy objectives. One method is by using competition law to enhance consumer welfare and rules aimed specifically at achieving the non-economic objective at issue to further that. This enhances legal certainty for the undertaking and is often the most efficient way of achieving both consumer welfare and the relevant non-economic objectives.

That said, compromise within competition policy allows the decision-maker to achieve the perfect balance, although sometimes we might temper this with an appreciability doctrine.²¹⁰ As a result, sometimes compromise is preferable. This may also be the case where for jurisdictional, speed or other reasons achieving the non-economic objective through alternative legislation is not possible, either at all, or in the short term.

4. CONCLUSION OF CHAPTER ONE

Chapter One debates two questions: *why* might competition policy incorporate non-welfare objectives? and *when* should competition policy consider non-welfare objectives? It adopted a theoretical perspective. Only by answering these questions can we place competition policy within a judicial framework and understand how it can and should interact with other areas of law.

The first question, *why* might competition policy incorporate non-welfare objectives?, is relatively easy to answer. Competition policy invariably has a welfare objective, normally consumer welfare. Consumer welfare, like all other welfare goals, is value-laden. It promotes consumer protection, in a wide sense. Furthermore, the pursuit of this policy objective through competition policy can affect other important policy objectives. Sometimes it reinforces them, sometimes it undermines them. Allowing competition policy to take account of these interactions means that other public policy goals, such as public safety and national security, would not necessarily be jeopardised because of welfare objectives.

²⁰⁸ The institutional design of the decision-maker is relevant to this discussion but is outside the scope of this work. See OECD (2003), pages 2 and 4; Mexican submission to OECD (2003), pages 3-5; Monti (2002), page 1093; Poiars Maduro (1999), pages 466 and 470; Mitchell and Simmons (1994), pages 41-84 and Baldock (1992), pages 5 and 18.

²⁰⁹ Dutch Ministry of Economic Affairs, *The Liberal Professions*, page 24 and Fox (2000), page 594.

²¹⁰ A major disadvantage of legislating specifically for the non-economic objective is that legislation of this kind is of general application. As a result, the optimal balance is unlikely to be achieved in every case. The disadvantages of this must be compared with the improvements provided by increased legal certainty.

That does not mean that competition should always be compromised for non-economic policy objectives. Understanding when this might be appropriate was Section 3's task and is the reason for the second question, *when* should competition policy consider non-welfare objectives? The answer to this question involves a difficult balancing act.

Ignoring non-economic policy objectives when applying competition law can create significant benefits, in terms of enhanced legal certainty. This encourages firms to invest and innovate. That said, at a certain point the benefits that enhanced legal certainty brings are outweighed by the importance of the policy goals it undermines. Even then, it may still be better to focus on a pure welfare test in competition policy if these non-welfare objectives can be adequately protected through other legislative tools.

In conclusion, no one body of law can protect everything that people value. All policy objectives cannot (and should not) be 'regulated' through competition policy.²¹¹ Often competition law is entirely inappropriate for that purpose (or other policy tools are much more efficient). Indeed, where competition policy pursues a consumer welfare standard it is often better to ignore non-economic policy objectives when implementing the competition law.²¹² However, this robust conclusion should be reconsidered where the benefits that enhanced legal certainty brings are outweighed by the importance of the policy goals at stake and these interests: (i) cannot be protected through alternative legislation (either in fact or for jurisdictional reasons); or (ii) have not actually been protected by alternative legislative tools.²¹³ However, if these other goals are incorporated into competition policy:

"...it is incumbent on the regulators to make these as transparent, and open to examination, as is possible."²¹⁴

²¹¹ Ariño (2004), pages 13-16; Areeda and Hovenkamp (2000), pages 6 and 96 and Bork (1993), page 429.

²¹² Van den Bergh (2002), page 56.

²¹³ It may be increasingly important to integrate certain other Treaty objectives within Community competition law after 1 May 2004 (at least in the short term) because, by way of example, the environmental problems in Central Europe are very serious, see Beckmann (2001), and environmental protection is scarce in these countries.

²¹⁴ Furse (1996), page 258.

CHAPTER TWO: SHOULD PUBLIC POLICY BE CONSIDERED IN ARTICLE 81?

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2. The Treaty
 - 2.1. How do conflicts arise in the Treaty?
 - 2.1.1. *Hierarchy*
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3. The Community Courts
 - 3.1. Exclusion
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5. Conclusion

1. INTRODUCTION

Many public policy objectives have been considered in article 81 of the Treaty. The Council, Commission, Community Courts and European Parliament have all endorsed this, see below. Community competition lawyers generally recognize that public policy is relevant in article 81.²¹⁵ So, why investigate whether public policy objectives should be taken into account there?

This chapter asks whether public policy objectives should be considered in article 81 for two reasons. First, as Sauter notes, in academic discussion it is often assumed as self-evident that the influence of political considerations on competition policy is unwarranted.²¹⁶ By placing article 81 in its Treaty context and explaining the alternatives to compromise, this chapter (and Chapter One) shows that public policy's influence is warranted there.

²¹⁵ See, for example, Goyder (2003), pages 121-123; Monti (2002); B&C (2001), paragraphs 1-075-1-081; Whish (2001), pages 15-19; Korah (2000), section 1.3.2.; Ritter, Braun, and Rawlinson (2000), page 17; Faull and Nikpay (1999), paragraphs 2.14-2.16; Mercier, Mach, Gilliéron and Affolter (1999), pages 130-132; Ehlermann (1998), pages 356, 359-385 and 489; Amato (1997), page 114; Sauter (1997); Bouterse (1994) and Verstrynge (1988), page 5. For a contrary view see Schaub (1998), page 9.

²¹⁶ Sauter (1997), page 120. See, for example, Ehlermann (1998), pages x and 9; Wißmann (2000), pages 143 and 144; Burrichter in Ehlermann (2001), page 46; Tesauo (1998), page 223; Marengo (2001), page 500; Schaub (2002), page 46 and Gyselen (2002a), pages 185-187. For contrary views see Monti (2002) and Amato (1997), pages 113-124.

Secondly, the Commission now says that the purpose of article 81(3), the article 81 paragraph where objectives are normally balanced, is:

"...to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations."²¹⁷

It is not certain what is meant by "political considerations" but its context implies that this means non-economic objectives.²¹⁸ The Commission has reaffirmed this stance more recently, see below. Does this indicate that the generally accepted position is changing? Given the importance of the Commission's role in the development of Community competition policy, see below, this statement, and others like it, must be carefully examined.

To decide whether the presence of 'political' considerations in article 81 is warranted, the article must be placed in its Community context.²¹⁹ Section 2 looks at the Treaty as a whole and examines *how* it deals with public policy conflicts. Then, Section 3 analyses *how* the Community Courts have interpreted the Treaty in relation to conflicts between public policy and competition. Throughout this discussion the pros and cons of both exclusion and compromise must be borne in mind, see Chapter One. In its policy statements, the Commission has said that public policy is irrelevant in article 81. Section 4 examines the Commission's policy statements in more detail and asks whether this attitude is reflected in its decisions. Section 5 concludes.

Why is it important whether public policy objectives should be considered within article 81? Competition policy cannot be made rational until we decide what its underlying objectives are. Undertakings need to know whether public policy arguments can be raised in article 81 proceedings. Decision-makers need to know whether they can/ should consider public policy issues. This question is particularly pressing today, see the Introduction.

2. THE TREATY

The Treaty creates a problem of conflicts in two ways. First, through the hierarchy of its articles. Secondly, because of the presence of policy-linking clauses. Section 2.1. examines both of these. Then, Section 2.2. asks how the Treaty deals with the conflicts that it has created.

²¹⁷ Commission, *White Paper on Modernisation*, paragraph 57. See, also, paragraph 72, although note the logical implication of paragraph 56.

²¹⁸ See, Monti (2002), page 1090 and references made there.

²¹⁹ Verouden (2003), page 530; Souty (2003), pages 23 and 43; Hildebrand (2002), pages 2 and 11; Baquero Cruz (2002), page 5; B&C (2001), paragraph 1-051; Korah (2000), page 6; Ritter, Braun, and Rawlinson (2000), page 17; Wesseling (2000), pages 18 and 32; Craig and de Búrca (1998), page 89; Ehlermann (1998), pages xvi and 551; Amato (1997); Sauter (1997), pages 116-122; Gyselen (1994), page 242; Bouterse (1994), pages 2 and 48; van Miert (1993), page 120; Schröter (1987), page 657; Slynn (1985), page 393 and Pescatore (1974), page 41.

2.1 How do conflicts arise in the Treaty?

2.1.1 *Hierarchy*

Article 2 outlines the purposes of the Treaty:

"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

Article 2 sets the task that the Community seeks to achieve. This consists of a number of "ultimate aims" such as the "...harmonious, balanced and sustainable development of economic activities..." and "...equality between men and women..." Article 2 contains at least nine "ultimate aims", all of which are broad, inter-related goals. These "ultimate aims" are to be achieved by, amongst others, implementing the common policies and activities referred to in articles 3 and 4.²²⁰

Article 3 provides an open list of over twenty Community activities for "...the purposes set out in article 2..." These activities range from a common commercial policy, an internal market and a system ensuring that competition in the internal market is not distorted, to environmental protection, a common transport policy, development co-operation and strengthening consumer protection.²²¹

The provisions of article 3 form part of the general principles of the common market, which are enlarged upon and applied by the later Treaty provisions. Taken in isolation, article 3 sheds no light on the relationship between these different policies.²²²

For our purposes, article 4 is divided into two parts. The first paragraph says, amongst other things, that for the purposes set out in article 2, the activities of the Community shall include, as provided in the Treaty, an economic policy:

²²⁰ One must not only look to articles 2, 3 and 4 for the objectives of the Treaty. The Preamble is another important source of information, as are the later Treaty provisions. Advocate-General Warner highlighted this in *Case 97/78 Fritz Schmalla* [1978], page 2323. General principles of law may also be relevant, see the *VBVB/VBBB Case*, paragraph 34 and the opinion of Advocate-General Verloren van Themaat, page 79, including references.

²²¹ Respectively, article 3(1)(b), (c), (g), (l), (f), (r) and (t).

²²² *Bourgeois and Demaret* (1995), page 66.

"...which is based on the close co-ordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition."

Article 4(2) expands on this saying that, as provided in the Treaty:

"...these activities shall include the irrevocable fixing of exchange rates leading to the introduction of a single currency, the ECU, and the definition and conduct of a single monetary policy and exchange rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition."

The later Treaty provisions implement the article 3 (and 4) activities which, in turn, seek to achieve the purposes set out in article 2 of the Treaty. This idea of hierarchy brings, buried deep within it, the seed of a problem, related to the broad nature of the article 2 aims. The "ultimate aims" or purposes highlighted in article 2 can conflict with one another, in the sense that one aim can sometimes only be achieved at the expense of another.²²³ For example, the promotion of both a high level of employment and social protection may conflict. By improving workers' conditions of employment we often increase unemployment.²²⁴ Even if there were no conflict of this type, different aims often compete against each other. A society with finite resources cannot pursue all aims totally, but must prioritise a few.

Article 3 currently contains an open list of over twenty activities that the Community will conduct for the purposes set out in article 2. These activities cannot be implemented blindly, but must be balanced against each other, as well as with those in article 4, in order to reflect the article 2 balance. For example, "...a system ensuring that competition in the internal market is not distorted...", article 3(1)(g), might well conflict with "...a policy in the social sphere comprising a European Social Fund...", article 3(1)(j).²²⁵

This potential for conflict between the underlying Treaty aims affects the implementing provisions such as article 81. Somehow these implementing provisions must deal with the conflicts generated within articles 2, 3 and 4. Section 2.2. discusses how they might deal with conflicts after we have examined the policy-linking clauses.

²²³ Case 27/74 *Demag AG v. Finanzamt Duisburg-Süd* [1974], Advocate-General Reischl, page 1056.

²²⁴ See, *Debating the Minimum Wage*, The Economist, 1 February 2001.

²²⁵ The *Albany Case*, paragraphs 54-60 and paragraph 2 of the Judgment's Summary and Case 139/79 *Maizena v. Council* [1980], paragraphs 23 and 24. More generally see Kirchner (1998), page 517.

2.1.2 "Policy-linking" clauses

There are seven policy-linking clauses in the Treaty.²²⁶ One such clause is article 152(1):

"A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities."

Article 159, relating to economic and social cohesion, another policy-linking clause, reads:

"The formulation and implementation of the Community's policies and actions and the implementation of the internal market shall take into account the objectives set out in article 158 and shall contribute to their achievement."

The Community policies relating to environmental protection, employment, culture, public health, consumer protection, economic and social cohesion and development policy all make it clear that each of them should be taken into account by the Community in the definition and implementation of its other policies and activities.²²⁷

There is widespread agreement that the policy-linking clauses are there to ensure that other Treaty rules, for example the free movement provisions or those relating to competition, take account of these other objectives.²²⁸

The requirement to take account of these policy aims (such as the environment) within Treaty policies and activities that pursue different aims (such as competition), may also lead to conflicts, as defined above, that need to be dealt with in the definition and implementation of the later Treaty articles.

2.2 How does the Treaty deal with conflicts?

When discussing the Treaty's hierarchy one might argue that the competition rules, amongst them article 81, are *solely* there to create "...a system ensuring that competition in the internal

²²⁶ The European Convention, if it becomes law, may extend this principle. See articles III-1, "The Union shall ensure consistency between the different policies and activities referred to in this Part, taking all of the Union's objectives into account..." Although articles III-4 and III-5 preserve specific policy-linking clauses too.

²²⁷ Respectively articles 6, 127(2), 151(4), 152(1), 153(2), 159 and 178 of the Treaty. Similar points are raised by rules, such as Declaration 29 to the Amsterdam Treaty on sport, which may try to achieve a similar end.

²²⁸ For example, in relation to article 151(4) (cultural policy), see, Council, *Resolution on Fixed Book Prices 2*; Council, *on culture's role in the EU's development*, recital 2; Council, *Resolution on Fixed Book Prices 1* and Council, *Decision on Fixed Book Prices* and Cunningham (2001), pages 122, 123 and 158-163. General Community lawyers readily embrace this conclusion, see, Vedder (2003), pages 3-16 and 169; Wasmeier (2001); Wyatt and Dashwood (2000), page 579; Jans (2000), pages 276 and 277; Kapteyn and VerLoren van Themaat (1998) page 128; Craig and de Búrca (1998), page 565; Commentaire Megret (1996), pages 12 and 251 and Brittan (1992), page 57. That said, commentators such as Barendt and Hitchens (2000), page 167 and Ariño (2004), page 7, suggest that article 151(4) of the Treaty "...has been interpreted more as a reminder to the Community of Member State sovereignty than as an encouragement of Community action." Some competition lawyers (often tentatively) agree that the policy-linking clauses mean that competition law should take non-economic objectives into account, see, Monti (2002); B&C (2001), paragraph 1-040; Faull and Nikpay (1999), paragraphs 2.14-2.16 and 2.145 and Ehlermann (1998), page xvi.

market is not distorted...", article 3(1)(g). Other chapters in the Treaty contribute to achieving other article 3 activities. The (independent) achievement of these activities will accomplish article 2's purposes, as a whole. Competition policy may then be seen as an instrument aiding the attainment of the Treaty objectives while also constituting *an end in itself*.²²⁹ This would not eliminate conflicts; but, it would ensure that they remained 'external' to article 81, and competition policy as a whole. Conflict would be dealt with by exclusion, not compromise.

Does the Treaty's structure support this argument? If it did, one would expect each article 3 activity to have specific Treaty articles implementing it. This is the case for most of them. However, article 3(u) asks for "...measures in the spheres of energy, civil protection and tourism." Civil protection and tourism are not mentioned elsewhere in the Treaty.²³⁰ As a result, these activities can only be achieved through later Treaty provisions, which *also* aim to achieve other article 3 activities *at the same time*. This does not necessarily mean that *all* of the later Treaty provisions implement *all* of the article 3 activities. It does mean that *some* must implement more than one article 3 activity.

There is also explicit support for using the later Treaty provisions to pursue various article 3 activities. For example, the *Declaration on Article 175 of the Treaty establishing the European Community*, annexed to the Treaty of Nice, reads:

"The High Contracting Parties are determined to see the European Union play a leading role in promoting environmental protection in the Union...Full use should be made of all possibilities offered by the Treaty with a view to pursuing this objective, including the use of incentives and instruments which are market-oriented and intended to promote sustainable development."

At least some of the later Treaty provisions must account for conflicting values. There is no indication of whether compromise is always necessary though. Exclusion is certainly not ruled out by Section One of the Treaty. Now we examine the later Treaty provisions.

The substantive Treaty provisions 'deal' with conflict in four ways. Occasionally, the Treaty expressly allows some values to exclude others. For example, under article 296(1)(b) the provisions of the Treaty, including the competition rules,²³¹ shall not preclude any Member State from taking such measures as it considers necessary for "...the protection of the essential

²²⁹ See, for example, Commission, *RCP 1996*, point 2 and Kirchner (1998), pages 514 and 516 (although he is unclear on this point, see pages 517 and 518). The Commission's arguments referred to above, page 1, may also be based on this logic. See also, Lenz (2000), pages 44 and 45, who rejects this approach. Heimler (1998), page 599, proffers a slightly different argument "...although the competition rules are enforced within the general framework of achieving the fundamental objectives of article 2 of the Treaty...such general considerations cannot override the legal effect of single provisions." This argument is undermined by the Community Courts use of the teleological approach, see below.

²³⁰ In addition, article 3 of the Treaty is not a closed list of all Community activities.

²³¹ See, Commission, *RCP 1993*, points 324-326 and Houttuin (1994), page 61.

interests of its security which are connected with production of or trade in arms, munitions and war material..." Here the Member States' protection of the essential interests of their security are allowed to exclude competition within a certain field.²³²

Exclusion is an extreme way of settling conflicts. Normally, where the Treaty expressly uses conflict resolution, it opts for a balancing process (compromise). For example, the values pursued by article 28's principle of free movement of goods must be balanced against the policy criteria listed in article 30.²³³

Thirdly, we saw above that the policy-linking clauses lead to certain conflicts within the Treaty. Do these clauses explain how to resolve these conflicts? With two exceptions, these clauses essentially state that the specific policy in question, such as environmental policy, must be taken into account in both the "...definition and implementation..." of other policies.²³⁴ What does the definition/ implementation distinction in the policy-linking clauses relate to? Is it discussing exclusion and compromise? For example, environmental policy, article 6, could be integrated into competition policy, both (i) by defining conflicts away through exclusion (definition); and, (ii) by balancing objectives through compromise (interpretation). If this were the case, the policy-linking clauses would allow both exclusion and compromise, except in relation to development policy and culture, where compromise is probably preferred.

This explanation of the definition/ implementation distinction cannot be correct. True, the policy-linking clauses express no explicit preference for exclusion or compromise. That said, the academic literature generally assumes that the policy-linking clauses imply compromise.²³⁵ This assumption is justifiable because policy-linking clauses must favour compromise. Why? Imagine that the Community has to take a decision where environmental protection and consumer protection conflict. There are policy-linking causes in relation to both of these areas,

²³² Note article 298 of the Treaty, however.

Another example of competition values being trumped, to the extent that article 81 has been excluded, can be seen in the Common Agricultural Policy, article 36 of the Treaty combined with Council Regulation 26/62, *Applying Certain Rules of Competition to Production of and Trade in Agricultural Products*, article 2(1).

²³³ See also, for example, customs duties (article 9) or the customs union (article 25), article 27 implies compromise in certain areas; article 39(1) (free movement of workers) balances other objectives through article 39(3) and (4); article 43 (freedom of establishment) balances other objectives through articles 45 and 46; article 49 (free movement of services) balances other objectives through article 55; article 56 (free movement of capital) balances other objectives through articles 58 and 59; article 61 (visa, asylum and immigration policies) balances other objectives through article 64; and, article 71(1) (transport policy) balances other objectives through paragraph 2.

²³⁴ The two exceptions are article 151(4) of the Treaty (culture) which says "The Community shall take cultural aspects into account in its action under other provisions of this Treaty..." and article 178 (development policy) which says "The Community shall take account of the objectives referred to in article 177 in the policies that it implements which are likely to affect developing countries."

²³⁵ See above, and Krämer (2003), pages 8, 19 and 21; McGillivray and Holder (2001), Section IV; Grimeaud (2000), pages 216 and 217; and Loman, Mortelmans, Post and Watson (1992), pages 195 and 196.

articles 6 and 153(2). They can only *both* be considered (as their policy-linking clauses demand) if compromise is used to resolve the conflict, see Chapter One.

If this is correct, what does the definition/ implementation distinction relate to? Baldock suggests that it is a procedural distinction. Decisions with significant environmental impact can be taken at different 'levels' of the policy process. A Community action plan might define policy, but this must also be implemented by regulations, decisions, etc. Baldock argues that the definition/ implementation distinction means that environmental considerations should be addressed at every stage of the policy process.²³⁶ Some support can be garnered for Baldock from the fact that the policy-linking clauses refer to both definition *and* implementation, see Chapter Seven.²³⁷

The final method 'adopted' by the Treaty for dealing with conflicts is silence. For example, article 28 deals with the free movement of goods. Where there are conflicts, certain objectives, those listed in article 30, must be balanced against the benefits of removing quantitative restrictions on imports and measures of equivalent effect. But what happens when article 28 conflicts with objectives that are not listed in article 30? These heads of exemption are often widely written, 'public policy' is one in article 30, for example. But do they include all relevant objectives? If article 28 conflicted with an objective, such as environmental protection, the policy-linking clause in article 6 would demand compromise. But how would this take place? Is environmental protection 'public policy' for the purposes of article 30? Also, what about objectives that are not found in policy-linking clauses and do not fall within one of the heads of exemption? The Community Courts provide some answers, see Section 3 of this chapter.

Another article where balancing is possible is article 81. Article 81(1) prohibits, as incompatible with the common market, agreements between undertakings which may affect trade between Member States and have as their object or effect the restriction of competition within the common market. Such agreements are void, article 81(2), unless saved by article 81(3):

"The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions

²³⁶ Baldock (1994), page 7. See also, Commentaire Megret (1996), page 251.

²³⁷ Not everyone agrees. The wide language in these policy-linking clauses states that, for example, environmental policy should be integrated into the definition and implementation of the Community *policies and activities*. Krämer says it is doubtful whether this refers to all individual measures. Krämer (2003), page 21. This is in line with the interpretation in relation to conducting impact assessments, see COM(2002) 276 final, pages 5 and 6 and also the implication from an early Council document, Council, *Guidelines for Community Cultural Action*, paragraph 7. This is commented on and criticised in Cunningham (2001), pages 139, 140 and 145-150.

which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Paragraph 81(3) allows for a balancing process.²³⁸ We have seen above that article 81 may not only pursue the values sought by article 3(1)(g), but we are not told whether it pursues all of the article 2, 3 and 4 values, or only some. Exactly which objectives can be considered in article 81(3) is open to debate. It is not phrased as widely as article 30, for example. This is especially important with objectives pursued by the policy-linking clauses which, as we have seen, demand compromise. Some of these, think of the human rights aspect of development policy, article 178, for example, do not seem to fall within article 81(3)'s natural meaning.²³⁹

2.3 Conclusion of Section 2

The Treaty objectives conflict to a certain degree. This is as a result of both the hierarchy of the Treaty and the policy-linking clauses. These conflicts can be dealt with in two ways. By allowing one conflicting objective to exclude the other; or, by compromising between the conflicting objectives in order to aim at an "optimal balance".

The optimal balance has a price. This is the lack of clarity that is the natural result of this process. This lack of clarity increases the more objectives must be balanced and the more diverse they are. The benefit of exclusion is clarity. The price is the exclusion of an (often) important factor. Exclusion becomes less satisfactory as a solution to conflicts the more important the trumped values are and the wider the "footprint" of the excluding value. Compromise is highly political, but it must not be forgotten that exclusion is too.

The early provisions in Part One of the Treaty exhibit a slight preference for compromise, but are essentially ambiguous on this point. This is unsurprising. They are there to establish the

²³⁸ In the Commission's view, article 81(3) of the Treaty "...expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition.", Commission, *Article 81(3) Guidelines*, paragraph 33. This is incorrect. Article 81(3) merely says that, when its four conditions are fulfilled, exemption may be granted. It does not speak of weighing 81(3) benefits against article 81(1). It is possible that the authors of the Treaty meant that *any* agreement fulfilling article 81(3)'s criteria (no matter how marginal the promotion of economic progress, for example, and no matter how great the restriction of competition), would be acceptable.

Compromise can be achieved in many different ways, see, for example, Aleinikoff (1987), pages 995-1004. That said, the Commission and the Community Courts use the balancing method, see the *Consten and Grundig Case*, page 348; the *VBVB/VBBB Case*, Opinion of AG Verloren van Themaat, page 88; Joined Cases 25 and 26/84 *Ford-Werke and Ford of Europe v. Commission* [1985], paragraphs 33 and 34; Joined Cases T-213/95 and T-18/96 *Stichting Certificatie Kraanverhuurbedrijf and Federatie van Nederlandse Kraanverhuurbedrijven v. Commission* [1997], paragraph 194 and Case T-112/99 *Métropole Télévision (M6) and Others v. Commission* [2001], paragraphs 73 and 74. See also, Commission, *Article 81(3) Guidelines*, paragraphs 11, 33 and 43; Whish (2003), page 151; Goyder (2003), page 121; Hildebrand (2002), page 231 and B&C (2001), paragraphs 3-019 and 3-025. That framework is adopted here.

²³⁹ See, for example, Ehlermann (1998), page xv. Having said that, others describe article 81(3)'s wording as, for example, 'extremely broad and vague', Kirchner (1998), page 516. We discuss the Community Courts' views below.

Treaty's objectives, rather than explain how they will be implemented. The later Treaty provisions are clearer. The vast majority either provide for compromise or are silent. The Treaty rarely explicitly advocates exclusion. It is unclear what should happen in relation to values that the Treaty does not expressly tell us either to ignore or to balance. Perhaps, there is only silence where conflicts were unforeseen? If not, and these objectives were not meant to be considered, why were they not expressly excluded? Given the potential costs of exclusion, see Chapter One, as well as the prevalence of compromise in the Treaty (when compared to exclusion), should we presume that, in cases of silence, compromise is to be preferred? The policy-linking clauses certainly demand compromise. But what of objectives that are not dealt with by such clauses?

Article 81 allows for a balancing exercise. Yet, its language does not seem wide enough to incorporate all objectives. Is this relevant? That depends on how the Treaty is to be read. Section 3 examines the Community Courts' judgments to see how they deal with these issues, particularly in relation to the competition objective and article 81 of the Treaty. Have the Community Courts interpreted article 81 widely enough to incorporate other objectives, including those supported by policy-linking clauses? If not, we must solve conflicts through exclusion.

3. THE COMMUNITY COURTS

One of the first points discussed in the last section was whether policies might be ends in themselves. Does competition policy, for example, solely aim to create "...a system ensuring that competition in the internal market is not distorted...", article 3(1)(g)? If so, any conflicts between competition policy and other article 3 activities would be dealt with by way of exclusion, not compromise. We saw that at least some of the Treaty's substantive provisions incorporate compromise, rather than exclusion. We were not sure whether competition policy (and article 81) was one of them. The ECJ answered this question back in 1966. It held:

"Article 85 [now article 81] lays down the rules on competition applicable to undertakings in Part Three of the Treaty which covers the 'policy of the Community'. It aims at bringing about the 'activities of the Community' mentioned in article 3 and in particular 'the institution of a system ensuring that competition in the Common Market is not distorted', and this is in order to arrive at 'establishing a Common Market' which is one of the fundamental objectives set out in Article 2."²⁴⁰

The first point to note is that the ECJ accepts the hierarchical Treaty "system" embedded in articles 2, 3 and 4, as outlined in the last part of this chapter.²⁴¹ Secondly, the ECJ holds that article 81 aims to bring about the *activities* mentioned in article 3, and thus the *purposes* of

²⁴⁰ Case 32/65 *Italy v. Council and Commission* [1966], page 405. Many other judgments say the same, for example, the *Leclerc Case*, paragraphs 8 and 9; Case 6/72 *Europemballage Corporation and Continental Can v. Commission* [1973], paragraphs 24 and 25 and Case 14/68 *Walt Wilhelm v. Bundeskartellamt* [1969], paragraph 5.

²⁴¹ Joined Cases C-78/90 and C-83/90 *Compagnie commerciale v. Receveur principal* [1992], paragraphs 17 and 18.

article 2.²⁴² In particular, but not exclusively, those mentioned in article 3(1)(g). It is not clear whether article 81 aims to bring about *all* of the article 3 activities, including those introduced after 1966. But, the fact that it aims at more than one means that at least *some* conflicts must be resolved *within* article 81, through balancing (compromise).

To my knowledge, the Community Courts have not expressly commented upon the effect of the policy-linking clauses on article 81. They have been given the opportunity of doing so on a number of occasions.²⁴³ There is limited case law on policy-linking clauses generally. However, the ECJ implies that they demand compromise, as opposed to exclusion. In *Germany v. European Parliament and Council*,²⁴⁴ Germany argued that consumer protection required a high level of protection (article 153(2)), which the directive at issue had not achieved. The ECJ held, paragraph 48:

"...although consumer protection is one of the objectives of the Community, it is clearly not the sole objective. As has already been stated, the Directive aims to promote the right of establishment and the freedom to provide services in the banking sector. Admittedly, there must be a high level of consumer protection concomitantly with those freedoms; however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State."

Remember that with exclusion, only one objective is achieved, the other is completely ignored, see Chapter One. If the objectives must be achieved 'concomitantly', then conflicts must be resolved through compromise and not exclusion. This is in line with Section 2's argument, that policy-linking clauses logically demand compromise.

The objective of free competition conflicts with other Treaty objectives. Due to the way that they interpret the Treaty, the Community Courts imply that at least some of these (probably those supported by the policy-linking clauses but perhaps also other objectives needed to achieve the article 2 goals) should be dealt with via compromise, within article 81. Section 2 argued that the Treaty's structure supports this interpretation.

²⁴² This interpretation has considerable academic support, see, Verouden (2003), page 530; Vedder (2003), page 169; Wyatt and Dashwood (2000), pages 539-542; van Miert (1999), page 2; Kapteyn and VerLoren van Themaat (1998), pages 109-132; Sauter (1997), page 120; Jebens and Stevens (1995-6), pages 458-461; van Miert (1993), page 120; Commentaire Megret (1992), pages 8-17; van der Esch (1991) and ESC, *Opinion on the Twenty-second Competition Report*, page 367.

²⁴³ For example, the French court referred to both article 151(4), the policy-linking clause relating to culture, and Council, *Decision on Fixed Book Prices I*, in the questions that it sent to the ECJ in the *Échirrolles Case*, paragraph 13. The ECJ did not refer to either and, in the end, the article 81 issue was not relevant in the case because there was held not to be an affect on trade between Member States, paragraph 24. Advocate-General Alber made a similar choice, see paragraphs 41-46 of his Opinion.

²⁴⁴ Case C-233/94, *Federal Republic of Germany v. European Parliament and Council* [1997]. See also, Case C-180/96 R *United Kingdom v. Commission* [1996], paragraph 63.

To the extent that compromise is necessary, can it occur *within* article 81?²⁴⁵ If so, how (and where) would this take place? Article 81's wording does not seem wide enough to incorporate all objectives. Is this relevant? Section 3.2. examines the Community Courts' approach to compromise within article 81.

Before discussing compromise, Section 3.1. discusses exclusion. Outside of the express exclusionary provisions, such as article 296(1)(b), what have the Community Courts decided? When should competition policy exclude other objectives and when should it be excluded? Is our emphasis on compromise (over exclusion) supported by the Community Courts' case law?

3.1 Exclusion

Should competition policy exclude?

The Treaty deems competition important.²⁴⁶ Article 2 calls for "...a high degree of competitiveness..." Competition or competitiveness are also referred to in, amongst others, the Preamble and articles 4, 27(c), 98, 105 and 136. The ECJ also considers competition important:

"...if Article 3(f) [now article 3(1)(g)] provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless."²⁴⁷

Assume that objective A conflicts with article 81's objectives, as we understand them. We do not know whether A can be balanced within article 81 yet. We must decide, whether to resolve the conflict through compromise or exclusion. Is 'competitiveness' important enough to exclude other objectives in case of conflict? If article 81 could exclude (ignore) other objectives, this would have an enormous impact on article 2's balance. This is because article 81 is applicable throughout most of the economy.²⁴⁸

²⁴⁵ Here I refer to the problem of interpreting the substantive article. Chapter Seven discusses specific limits on what should be considered within article 81, imposed by the doctrines of 'competence' and 'direct effect'.

²⁴⁶ Tizzano (1998), page 484 and Waelbroeck (1998), page 585. Nevertheless, while this has been underlined by certain specific Treaty articles, see below, it might be advisable to include a policy-linking clause in favour of competition next time the Treaty is amended, OECD (2003), pages 3 and 7. This approach has been adopted, with varying degrees of success in, for example, Canada, Costa Rica, Côte d'Ivoire and the USA, see, UNCTAD document TD/B/COM.2/EM/10/Rev.1., paragraph 34 and Côte d'Ivoire, *RCP 1996*. Komninos (2005) DRAFT, page 5, argues that the ECJ has already gone some way down this road, see Case C-17/90 *Pinaud Wiegier v. Bundesanstalt für den Güterfernverkehr* [1991], paragraph 11. See also, Bourgeois and Demaret (1995), pages 112 and 113.

²⁴⁷ Case 6/72 *Europemballage Corporation and Continental Can v. Commission* [1973], paragraph 24. This was an article 82 case, but the ECJ makes it clear, paragraph 25, that its comments apply to both articles 81 and 82.

²⁴⁸ Faull and Nikpay (1999), paragraph 2.06. See, for example, Joined Cases 209 to 213/84 *Ministère public v. Asjes* [1986], paragraphs 27-45.

Exclusion is dealt with, at least in part, by the *Échirolles Case*. Before discussing the judgment we must put 'competition' into a Treaty context. We examine article 4 of the Treaty, which provides the background to this decision. Note that 'competition' is not defined anywhere in the Treaty. This issue is discussed further in Chapter Six.

Article 4 says that economic and the monetary policies have both been introduced for the "...purposes set out in article 2..." Note also the emphasis given to this point in one of the implementing articles, article 105(1), the objectives of the European System of Central Banks (the "ESCB"). Article 105(1) says that the primary objective of the ESCB is price stability but, without prejudice to this objective, the ESCB shall "...support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2." This seems to imply some sort of balancing act.

But what of the language at the end of article 4(1) and (2), which states that these economic and monetary policies must be conducted "...in accordance with the principle of an open market economy with free competition."? The same sort of language can also be found in the implementing articles 98 (economic policy) and article 105(1), both of which command the relevant actors to:

"...act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in article 4."

Do these provisions demand that an open market economy and free competition somehow take precedence over (exclude or trump) other objectives? This is a hard question to answer. However, some clues can be found in the *Échirolles Case*, which involved article 1 of French Law No. 81-766 of 10 August 1981 (the "Law") on book prices. The Law said, amongst other things, that the publisher or importer of a book must fix its price and the bookseller must normally sell the book at between 95 and 100% of that price. The case was brought by Association du Dauphiné and others, booksellers, who attacked the sale, by Échirolles Distribution SA, which runs a business under the name Centre Leclerc, of books at a price more than 5% below that fixed by the publisher or importer.

The French court referred a number of questions to the ECJ, under article 234 of the Treaty, essentially asking whether articles 3(1)(c) and (g), 4, 10, 7 (now repealed), 14, 98, 99(3) and (4) of the Treaty precluded the application of national legislation such as the Law.

There had already been a reference to the ECJ in relation to the Law. There the ECJ held:²⁴⁹

²⁴⁹ The *Leclerc Case*, paragraph 20.

"...the purely national systems and practices in the book trade have not yet been made subject to a Community competition policy with which the Member States would be required to comply by virtue of their duty to abstain from any measure which might jeopardise the attainment of the objectives of the Treaty. It follows that, as Community law stands, Member States' obligations under article 5 of the EEC Treaty [now article 10], in conjunction with articles 3(f) and 85 [now articles 3(1)(g) and 81], are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books, provided that such legislation is consonant with the other specific Treaty provisions, in particular those concerning the free movement of goods."

Échirolles argued, paragraphs 17-19, that the Law created a non-competition area, which was wider than it needed to be to achieve its intended objectives. It added that the ECJ's judgement in the *Leclerc Case* made specific reference to the state of Community law at that time. That judgement was given before the creation of the internal market on 1 January 1993. Échirolles added that the introduction of provisions on the internal market "...may mean that the above-mentioned system is incompatible with the relevant provisions of the EC Treaty."

The ECJ replied that article 3 lays down the general principles of the common market, which are to be applied in conjunction with the later Treaty provisions. This includes, since the SEA, the objective of an internal market, articles 3(1)(c) and 14 of the Treaty. The ECJ found, paragraph 24, that as the Law involved a purely national system, see paragraph 20 of the *Leclerc Case* above, and as article 81 had not been amended since that judgment, the ECJ could not call into question its previous judgment. The ECJ continued, paragraphs 25-26:

"As regards Articles 3a, 102a and 103 [now articles 4, 98 and 99] of the Treaty, which refer to economic policy, the implementation of which must comply with the principle of an open market economy with free competition (Articles 3a and 102a), those provisions do not impose on the Member States clear and unconditional obligations which may be relied on by individuals before the national courts. What is involved is a general principle whose application calls for complex economic assessments which are a matter for the legislature or the national administration.

The answer to the question referred to the Court must therefore be that Articles 3(c) and (g) [now article 3(1)(c) and (g)], 3a and 5 [article 10], the second paragraph of Article 7a [now article 14] and Articles 102a and 103 of the Treaty do not preclude the application of national legislation requiring publishers to impose on booksellers fixed prices for the resale of books."

The ECJ held that articles 4 and 98's obligation, in relation to economic policy, that Member States and the Community act in accordance with the principle of an open market economy with free competition, does not impose on the *Member States* obligations that can be relied on before the national courts. The ECJ added that, despite the comparatively clear language of those articles, the call for an open market economy and free competition is merely a "general principle" which calls for complex economic assessments, i.e. it is an objective to be balanced, in this case against culture. A similar conclusion likely applies to the comparable wording within article 105(1) of the Treaty, and other similar Treaty articles, see above.

The ECJ did not expressly state that when the *Community institutions* are legislating in this area, articles 4 and 98 merely oblige them to balance the principle of an open market economy with free competition against other relevant objectives. It is likely that this is the case;²⁵⁰ especially given the Commission's wide discretion in relation to the implementation of the competition provisions, see below. This was certainly Advocate-General Alber's view. In the *Échirolles Case* he said that, paragraph 41, reference should be made to article 151(4) of the Treaty:

"...under which the Community has to take cultural aspects into account in its action, which therefore includes the way in which it takes action in the field of competition."

Articles 4 and 98's wording highlights the importance of an open market economy and free competition. It may give 'free competition' extra weight when it is balanced against other objectives.²⁵¹ However, it should not be read as promoting the concepts of an "...open market economy and free competition..." such that they trump or exclude other objectives.²⁵² This appears to be the right decision when the provision is placed in its Treaty context. As Advocate-General Mischo explains:

"It does not follow from those provisions [articles 4 and 98]...that Community law places greater value on the principle of free competition than it does on the other principles. The fact is that the European Treaties simultaneously pursue several objectives, which must be reconciled."²⁵³

The competition provisions themselves support this position. Some, such as articles 86 and 87 expressly take account of other objectives. Articles 81, 82 and the ECMR do not expressly exclude the incorporation of the other article 2 and 3 purposes and activities.²⁵⁴ Indeed, the language of articles 81 and 82, as well as the ECMR, allows for the incorporation of other policy objectives into them. In article 81 this occurs in both paragraphs (1) and (3), see below and Part B. This paper does not discuss article 82 or the ECMR in detail but article 82 allows for

²⁵⁰ See, for example, Sauter (1998), page 54 and Barents (1990). For a contrary view, see Mestmäcker (2000), pages 409 and 410, where he interprets article 98 as binding the economic policy of both the Community and the Member States. Mestmäcker does not justify this view and it seems contrary (at least as regards the Member States) to the clear wording of the ECJ in the *Échirolles Case*.

²⁵¹ "The principle of undistorted competition must now be considered of equal rank with industrial policy, R&TD policy, social policy, regional policy, environmental policy and further activities introduced by article 3.", Streit and Mussler (1995), page 24. Some argue that articles 3, 98 and 157 imply that competition now enjoys a higher status than industrial policy and trade policy, Bourgeois and Demaret (1995), page 67.

²⁵² Monti (2002), page 1093; Schmid (2000), pages 164 and 165 and Bourgeois and Demaret (1995), page 67. For arguments against this view see the references in Schmid (2000), page 164.

²⁵³ Joined cases C-49/1998, etc., *Finalarte Sociedade de Construção Civil v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001], Opinion, paragraph 46. The ECJ did not discuss articles 4 and 98 in this case. See also Edward in Ehlermann (2001), pages 566 and 567.

²⁵⁴ Subject to what I say below, nor do they expressly state that they will incorporate these aims. However, this is not the style of the Treaty. As we have seen, the policy-linking clauses state that the Community must take account of them in its policies and activities, none of them say that they will take account of others. This must be implicit though, otherwise the effect of these provisions would be significantly reduced.

the balancing of other objectives through the notion of "abuse".²⁵⁵ The decisions under the Merger Regulation were able to take account of "considerations of a social nature", a similar stance is likely under the ECMR.²⁵⁶

Should competition law be excluded?

Assume that an implementing provision (let's call this article X) does not incorporate competition objectives within it. Imagine that article X applies in a specific factual situation and the application of the competition provisions (amongst them, article 81) are excluded. In this scenario, where articles 81 and X would have conflicted, competition values are also excluded.

We have seen that the Community Courts consider competition to be important. If they were to allow competition to be trumped (excluded) by other objectives, then this key objective would be ignored. The Treaty has provided for this only on some narrowly defined grounds, see above. Unsurprisingly, the Community Courts are reluctant to allow competition to be trumped or excluded outside of these. In the CFI's words:

"It should also be recalled that...where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect."²⁵⁷

Despite this, the Community Courts have allowed competition to be excluded even though the Treaty did not expressly provide for it. One example is the *Albany Case*,²⁵⁸ which originated in the Netherlands. In this case a conflict existed between the competition provisions, in this case articles 81, 82 and 86 of the Treaty, and the social provisions which encourage collective bargaining, article 136 and following.

In Dutch law, employers are often obliged to affiliate their employees to a compulsory sectoral pension fund. The Minister for Social Affairs, at the request of a group of employers' associations and trade unions deemed by the Minister to be sufficiently representative, can issue a decree requiring all groups of persons belonging to a given sector of the economy to be affiliated to a sectoral pension fund. In the absence of a specific request the Minister has no such power. All persons falling under the decree, together with their employers must abide by the

²⁵⁵ See the concept of "objective justification" in cases such as Case T-30/89 *Hilti v. Commission* [1991], paragraphs 102-119. This point was not raised on the subsequent appeal to the ECJ. See also Verstryne (1988), page 5.

²⁵⁶ See, for example, Commission decision, *Mannesmann/ Vallourec/ Ilva*, decided under the Merger Regulation, Banks (1997) and recital 23 and articles 2 and 21 of the ECMR. Indeed, article 2(1)(b) contains wording which is very similar to article 81(3) of the Treaty. On the consideration of national interests there, see, Mohamed (2000).

²⁵⁷ Case T-61/89, *Dansk Pelsdyravlforening v. Commission* [1992], paragraph 54. See also, Case T-144/99 *Institute of Professional Representatives before the European Patent Office v. Commission* [2001], paragraph 67; the *Pavlov Case*; the *Asjes Case* and Case 45/85 *Verband der Sachversicherer e.V. v. Commission* [1987].

²⁵⁸ See also, Case C-222/98 *Hendrik van der Woude v. Stichting Beatrixoord* [2000], paragraphs 22-27. The Community Courts sometimes use other mechanisms to exclude competition too. See, for example Townley (2005), on the concept of an undertaking in Community competition law.

rules of the relevant sectoral pension fund. The obligations to pay the contributions are legally enforceable.

The Textile Industry Trade Fund (the "Fund") was one of these sectoral pension funds. Albany was an undertaking operating within its industry. Albany also set up its own supplementary pension plan managed by an insurance company. This was much more generous than the Fund's pension. The Fund changed and made its pension plan better but Albany still thought its own pension plan made better provision for its employees. So it asked to be exempted from the Fund. The Fund refused.

Albany brought an action against the Fund concerning Albany's refusal to pay to the Fund contributions for 1989 on the ground that compulsory affiliation to the Fund, by virtue of which these contributions were claimed, was contrary to articles 3(1)(g), 81, 82 and 86 of the Treaty.

The ECJ noted that article 3 of the Treaty contained a number of different activities, paragraph 54, and that article 137 of the Treaty provides that the Commission is to promote close co-operation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers, paragraph 55. This might lead to relations based on agreement between management and labour at the European level, article 139, paragraph 56.

The ECJ then went on to emphasise, paragraphs 57 and 58, that the Agreement on social policy²⁵⁹ states that the objectives to be pursued by the Community and the Member States include improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. Article 4 of that Agreement says that agreements may be concluded as a result of the dialogue between management and labour at the Community level. The ECJ continued, paragraphs 59 and 60:

"It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) [now article 81(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment."

"It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty."

²⁵⁹ Community Agreement on Social Policy with the exclusion of the UK (1992).

The ECJ found a conflict, paragraph 59, between the social policy objectives and the competition policy objectives, as pursued by article 81. The ECJ allowed the social policy objectives (as implemented by article 137) to trump the competition law ones (as implemented by article 81), in collective agreements between management and labour, though not those conducted outside of such a relationship,²⁶⁰ which aim to improve the conditions of work and employment.

Both the ECJ and Advocate-General Jacobs favoured exclusion over compromise.²⁶¹ But was there even a conflict? The ECJ thought so, "... certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers." However, while the Treaty facilitates collective agreements, it does not demand that they restrict competition. Thus, under cases such as *Ahlström Osakeyhtiö v. Commission*, a conflict has not been created.²⁶² There the ECJ found no conflict as US law allowed, but did not require, conduct which infringed article 81 of the Treaty. It is questionable whether collective agreements inherently include (by their nature and purpose) restrictions on competition such that trade between Member States is appreciably affected. Therefore, it is arguable whether, by their very nature, the social policy objectives and the competition policy objectives conflict.

However, possibly foreseeing this issue the ECJ went on "... the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to article 85(1) [now article 81(1)] of the Treaty..." As a result, the ECJ advocated the complete exclusion of the consideration of competition objectives, via article 81, from this sort of agreement. But did the Treaty's authors think that subjecting these collective agreements to competition law would seriously undermine their social policy objectives. Probably not. It seems contrary to articles 136-145 of the Treaty to *per se* exclude these social rules from the ambit of competition law. Article 136 says that implementing measures should take account of "...the need to maintain the competitiveness of the Community economy..." Article 140 adds that article 136's objectives are to be achieved "...without prejudice to the other provisions of this Treaty..."²⁶³

It is anomalous to deal with the issue in this way,²⁶⁴ given the emphasis on competition in other decisions, as well as the ability to balance such considerations within article 81 itself, see

²⁶⁰ The *Pavlov Case*, paragraphs 68-70 and the opinion of Advocate-General Jacobs, paragraphs 96-99.

²⁶¹ Although Advocate-General Jacobs tries to deal with this risk by re-introducing a balancing element later in his analysis, paragraphs 190-194 of his opinion.

²⁶² Joined Cases 89/85, etc., *Ahlström Osakeyhtiö v. Commission* [1988], paragraph 20.

²⁶³ The Community Agreement on Social Policy with the exclusion of the UK (1992) makes a similar point.

²⁶⁴ See, the opinion of Advocate-General Lenz in Case C-415/93 *Union Royale Belge des Sociétés de Football Association v. Jean-Marc Bosman* [1995], paragraph 273.

below.²⁶⁵ *Albany's* far-reaching exemption of social law from competition law's scope is not indispensable for achieving labour policy goals and pre-empts any discussion of the welfare effects of collective bargaining.²⁶⁶ Two important Treaty objectives were at stake, instead of taking them both into account, one was ignored.

The *Albany Case* demonstrates the impact of exclusion. As noted above, outside of this the Community Courts have been reluctant to allow for the trumping of competition policy.²⁶⁷ The Treaty seems to confirm this stance. It is clear why. Undertakings are now able to appreciably restrict competition between Member States through collective agreements between management and labour, which aim to improve the conditions of work and employment. This might even include the level of salaries, the *Albany Case*, paragraph 63.

3.2 Compromise

Sometimes objectives conflict. The Community Courts are reluctant to use trumping to deal with competition policy conflicts, at least insofar as article 81 and competition are concerned. This is probably due to the perceived importance of this policy objective, as well as to the size of article 81's footprint. And yet, the Community Courts cannot ignore these conflicts. This implies that compromise should take place within article 81, see above.

One might question whether it is possible to balance all relevant values within article 81, in light of that provision's wording. It is. Even where the Treaty is silent, the Community Courts have principally dealt with conflicts by way of compromise. They have done this by adopting a purposive or teleological approach to Treaty interpretation. As Craig and de Búrca explain:²⁶⁸

"...the Court tends to examine the whole context in which a particular provision is situated - which often involves looking at the Preamble to the Treaties... - and it gives the interpretation most likely to further what the Court considers that provision in its context was aimed to achieve. Often this is very far from a literal interpretation of the Treaty...even to the extent of flying in the face of the express language."

This applies to the values pursued by the policy-linking clauses. Neither the provisions on freedom of establishment, nor those on freedom to provide services, expressly incorporate consumer protection objectives, yet we saw above that in *Germany v. European Parliament and*

²⁶⁵ On this point Advocate-General Jacobs is against me, see his opinion in the *Albany Case*, paragraph 178.

²⁶⁶ Van den Bergh and Camesasca (2000), pages 501-508.

²⁶⁷ Even if *Albany* is an extension of the principle that the competition rules can only be derogated where the Treaty makes express provision, it may be a limited one. The references to 'agreement' in article 137 and 139 are the only references to agreements between private parties in the whole Treaty, with the exception of article 81.

²⁶⁸ Craig and de Búrca (1998), page 89. See also, Wyatt and Dashwood (2000), pages 197-200; Fennelly (1997), page 250 and de Wilmars (1986), pages 16-20 and the cases cited there.

Council the ECJ implied consumer protection into them *as a result of the policy linking clause*, article 153(2) of the Treaty.²⁶⁹

It also applies to other (non policy-linking clause) values. The free movement of goods provisions are illuminating in this regard.²⁷⁰ Against article 28's clear wording, the Community Courts have 'found' an open list of mandatory requirements.²⁷¹ These are in addition to article 30's express exemptions.²⁷² The interests protected by the mandatory requirements must be recognised in Community law.²⁷³ Within these limits, they are repeatedly invoked to defend national public interests.²⁷⁴

When the Community Courts decided to balance within article 81 they were confronted with two problems. First, article 81 of the Treaty does not, on its face, encourage the balancing of *all* relevant objectives, in particular many of those pursued in the policy-linking clauses. Secondly, they had to balance the desire for an "optimal balance" with legal certainty. Legal certainty is particularly important to private actors because they do not participate in the decision-making process to the same extent as public ones. This means that they find it more difficult to assess the content of particular policies and to weigh them. The interpretation of article 81 is considered next. The second issue is dealt with in Part C.

As noted above, article 81 of the Treaty does not, on its face, encourage the balancing of *all* relevant objectives. The Community Courts have dealt with this problem in two ways. They have implied a balancing exercise into both article 81(1) and (3). Chapter Six discusses the advantages and disadvantages of using these two paragraphs.

²⁶⁹ It is possible that this issue was not argued before the court and so the precedent value of the case may be diminished in this respect. The ECJ reads the policy-linking clause as demanding compromise. This suggests that article 153(2)'s reference to 'defining and implementing' refers to procedural, not substantive, issues.

²⁷⁰ Mortelmans (2001), page 618 and Aubry-Caillaud (1998), pages 22 and 23. It happens in other areas too, for example, Craig and de Búrca (1998), Chapter 17 and Snell (2002), pages 181-194. For a justification for the mandatory requirements, see Craig and de Búrca (1998), pages 628 and 629.

²⁷¹ Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979], paragraph 8.

²⁷² I.e. this is not done through a wide interpretation of 'public policy' in article 30.

²⁷³ While the Community Courts demand the 'final say' on what objectives are acceptable, Oliver (2003), paragraph 8.37, this requirement is, in fact, unimportant. Snell (2002), page 191 notes "...it may be doubted whether the Court in actual fact exercises any review at this level. It has never refused to accept the possibility that a certain non-economic ground of justification...could save an indistinctly applicable measure."

²⁷⁴ See, Oliver (2003), paragraph 6.74 and Chapter 8 and Mortelmans (2001), page 622. Amongst the mandatory requirements are cultural policy, fairness of commercial transactions, consumer protection, environmental protection, pluralism of the media; fostering certain forms of art; and social order, see, Oliver (2003), Chapter 8; Snell (2002), page 192 and Craig and de Búrca (1998), Chapter 14.

3.2.1 *Balancing (compromise) within article 81(1) of the Treaty*

It is generally agreed that, in *Wouters*, the ECJ balanced different values²⁷⁵ within article 81(1).²⁷⁶ Many point to the similarity between judgments like *Wouters* and the mandatory requirements under article 28.²⁷⁷ In *Wouters*, the agreement at issue was the Dutch Bar Council's 1993 Regulation, prohibiting lawyers in the Netherlands from forming partnerships with non-lawyers, unless the Bar Council had given its consent.²⁷⁸ Mr Wouters, and another lawyer, wanted to enter into a partnership in a firm of accountants. The Bar Council refused their application. So, they questioned the compatibility of this rule with article 81. The ECJ found that the rule restricted competition, paragraphs 86-94. There was also an impact on trade between Member States, paragraphs 86, 95 and 96. That should have been the end of the matter.²⁷⁹ But the ECJ continued,²⁸⁰ paragraph 97:

"However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in article 85(1) [now article 81(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience...It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."

²⁷⁵ In that case the ECJ balanced professional ethics and competition, but it did not restrict the balancing to these values and it seems likely that others would be considered there, Cooke (2005) **DRAFT**, pages 8 and 9.

²⁷⁶ There have been many other instances of balancing under article 81(1), from the introduction of the concept of 'workable competition', the *Metro I Case*, paragraph 20 (discussed in Bouterse (1994), pages 24 and 25); to the notion of ancillary restraints (B&C (2001), paragraphs 2-112 and 6-170-8-183) and, possibly, the rule of reason (B&C (2001), paragraph 2-063). See also, Whish (2003), pages 117-123.

²⁷⁷ See, Komninos (2005) **DRAFT**, page 9 and the references made there; Baquero Cruz (2002), page 153; Monti (2002), section 5; Mortelmans (2001) and O'Loughlin (2003), for example. The ECJ's references to 'unfair commercial practices' in Joined Cases 100-103/80 *SA Musique Diffusion Française v. Commission* [1983], paragraphs 89 and 90 intentionally echo the mandatory requirements caselaw. The ECJ did the same in *Wouters*, paragraph 97, although by now the mandatory requirements also apply to freedom of establishment, Snell (2002).

²⁷⁸ In this respect, *Wouters* is a departure from previous caselaw, which demanded some form of articulation of the public interest objectives by the public authorities, see Gilliams (2005) **DRAFT**, page 28.

²⁷⁹ The horizontal agreement did not fall within a block exemption, nor had it been notified to the Commission (Whish (2003), page 123), a condition for considering article 81(3) at that time, see above. Gilliams (2005) **DRAFT**, page 25, says that the agreements were notified to the Commission, but only after the commencement of the disciplinary proceedings, see also Cooke (1995) **DRAFT**, page 10.

²⁸⁰ In *Wouters*, the ECJ may be refining the CFI's judgment in Case T-144/99 *Institute of Professional Representatives before the European Patent Office v. Commission* [2001], paragraphs 77-79 and 90-100.

The mechanism that the ECJ follows when considering these national interests is important. It balances these national interests against the restriction on competition,²⁸¹ using what seems to be a proportionality test, see Chapter Three. This should be compared with the *Albany Case*, where, as we saw above, the ECJ solved the conflict through exclusion.²⁸²

Therefore, in certain cases, one can balance non-competition objectives²⁸³ against a restriction of competition and conclude that the former outweigh the latter, with the consequence that there is no infringement of article 81(1) of the Treaty.²⁸⁴

3.2.2 *Balancing (compromise) within article 81(3) of the Treaty*

The second paragraph that the Community Courts have used to balance within article 81 is article 81(3) of the Treaty. The relevant part of article 81(3) says that agreements which infringe article 81(1) may be exempted if they contribute:

"...to improving the production or distribution of goods or to promoting technical or economic progress..."

We saw above that article 81 incorporates more of the article 3 activities and policies than those of article 3(1)(g). But does it include all, or only some of them? If it were the intention of the Treaty's signatories that article 81(3) be used to balance all objectives, article 81(3) might have been more clearly written. It does not seem to allow for many objectives to be taken into account, see above. That said, article 81(3) has not been altered since 1957, when the Treaty's aims and objectives were narrower than they are today.²⁸⁵ As the relevant objectives have broadened, the Community Courts have interpreted article 81(3) of the Treaty more widely. They have done this in two ways. First, by interpreting article 81(3)'s text expansively. Secondly, by moving away from the literal wording altogether and conducting a general public policy test there.

²⁸¹ Forrester (2005) **DRAFT**, page 17; Subiotto and Snelders (2003), page 12; Whish (2003), page 121 and 127 and Goyder (2003), pages 94 and 95, agree that the ECJ conducts a balancing test here. Vossestein (2002), page 859, agrees that this may be the case. Alternatively, he suggests that because the rule improved the quality of legal services, it enhanced "...consumer choice and thus [was] pro-competitive." In fact, agreements to improve the quality of services in this way often reduce consumer choice, for better or for worse, see, Fletcher (2005) **DRAFT**, paragraphs 12-15 and Scarpa (2001), section C. Monti (2002), pages 1087 and 1088 criticises this part of Vossestein (2002), on other grounds.

²⁸² See also, Vossestein (2002), page 856. Monti (2002), pages 1086-1090, may disagree. He says that *Wouters* is an example of "national interests excluding the application of article 81 altogether". This is the language of exclusion. That said, Monti is unclear on this point. He also refers to a balance, page 1086, and to the free movement provisions' mandatory requirements, which comprise a balancing test, see above.

²⁸³ See, Case T-112/98 *Métropole télévision and Others v. Commission* [2001], paragraphs 72-78, which only says that there should be no balancing of pro-competitive aspects in article 81(1) of the Treaty. Although, the *Wouters Case*, appears to look at pro-competitive aspects within article 81(1), paragraphs 86-94. On this point, also see, Subiotto and Snelders (2003), page 11 and Vossestein (2002), pages 856-859 and Chapter Six.

²⁸⁴ Whish (2003), page 121 and Forrester and MacLennan (2003), pages 547-551.

First, the Community Courts and the Advocate-Generals interpret article 81(3)'s first condition widely. For example, in the *Metro I Case*, where the legality of SABA's selective distribution system for electronic equipment such as radios, televisions and tape recorders was at issue, the ECJ said, paragraph 43:

"...the establishment of supply forecasts for a reasonable period constitutes a stabilising factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may²⁸⁶ be had pursuant to Article 85(3) [now article 81(3)]."²⁸⁷

It is a wide interpretation of article 81(3) of the Treaty that exempts agreements under this head, in part, because they help stabilise employment.²⁸⁸ By inserting the word "...general..." the ECJ is more easily able to interpret "...conditions of production..." widely. The ECJ added that this agreement, which allows for the establishment of supply forecasts for a reasonable period, constitutes a stabilising factor with regard to the provision of employment "...especially when market conditions are unfavourable..." By focusing on the benefits when market conditions are unfavourable the ECJ's argument seems even more acceptable. But it does not necessarily make sense to focus upon the "bad times". The Commission's exemption ran for four and a half years. It would be better to look at the agreement's overall impact on employment over this longer timeframe. However, the effect of adding this phrase is to allow the ECJ to interpret article 81(3) of the Treaty yet more widely.²⁸⁹ As Advocate-General Jacobs reminds us:²⁹⁰

"Both the Court and the Commission have on occasions recognised the possibility of taking account of social grounds...in particular by interpreting the conditions of article 85(3) [now article 81(3)] broadly..."

All four categories in article 81(3)'s first provision can be interpreted widely.²⁹¹ We have seen an interpretation of improving the production of goods, what about their distribution? Do

²⁸⁵ See, Wesseling (1997), pages 38-47, and the references made there.

²⁸⁶ Since this case was decided, article 127 (employment policy-linking clause) has been introduced. Does this change 'may' to 'shall'? If so, this conflicts with the discretion to apply article 81(3) of the Treaty, see Chapter Seven.

²⁸⁷ The ECJ refers to this point favourably in Joined Cases 209/78, etc., *Heintz van Landewyck Sàrl v. Commission* [1980], paragraphs 176 and 182. Also see, Case 42/84 *Remia v. Commission* [1985], the opinion of Advocate-General Lenz, pages 2564 and 2565.

²⁸⁸ Note also that this the ECJ is not merely using article 81 for the purposes of 'negative integration'. A true, creative, 'policy' head is at work here. For a discussion on 'negative integration' see, Craig and de Búrca (1998), page 17 and chapter 14.

²⁸⁹ Also see, Bouterse (1994), Chapter 6, in relation to monetary policy and improving the production of goods.

²⁹⁰ The *Albany Case*, paragraph 193.

²⁹¹ Goyder (2003), pages 59, 119 and 120 says the four article 81(3) heads are "...broad statements of principle to be read in the context of the remainder of article 81 and the other Treaty provisions..." See also, Wesseling (2000), pages 20, 39 and 109-111; Vogelaar (1994), page 543; Bouterse (1994), pages 26-28; Art (1994), pages 25 and 26 and de Roux and Voillemot (1976), page 96.

agreements to promote the dissemination of television programmes fall within this head?²⁹² If so, programmes relating to the different Community cultures might benefit from an exemption, remember article 151(4) of the Treaty? What of improving technical progress? Some suggest that this expression allows for the exemption of agreements that improve our ability to protect the environment, such as agreements to make cleaner cars, remember article 6 of the Treaty.²⁹³ Research and development agreements contribute to technical and economic progress.²⁹⁴

These judgments, widening article 81(3)'s wording, are important. It cannot be argued that these citations are unconsidered statements by the courts.²⁹⁵ True, the ECJ relied on two other factors (as well as employment) in *Metro I* to support the Commission's conclusion that the conditions of production were improved. Nevertheless, the employment discussion was central to the judgment and cannot merely be described as *obiter*.²⁹⁶ The ECJ's later statement in support of its *Metro I* judgment in *Van Landewyck* was also considered, although, strictly speaking, it was *obiter*.²⁹⁷ Finally, in *Matra*, although the CFI does not discuss social criteria,²⁹⁸ the core of its decision is based upon industrial policy arguments, paragraphs 109 and 110.

So the Community Courts interpret these heads generously. Might they allow new heads of exemption too, including those of the policy-linking clauses? Advocate-General Darmon opined that article 81(3) exhaustively lays down the objectives which justify exemption.²⁹⁹ Despite this, the Community Courts seem willing to extend these four heads. Sometimes this has been express. In one line of caselaw³⁰⁰ the Community Courts attempted to include the article 30 heads of exemption within article 81(3) of the Treaty, particularly in relation to intellectual property rights. Advocate-General Reischl, opined that the *Sirena Case* held:

²⁹² Services are included within the term 'goods', Case 45/85 *Verband der Sachversicherer v. Commission* [1987], paragraph 58.

²⁹³ See, Jans (2000), page 278 and Jacobs (1993/2), pages 53-56.

²⁹⁴ See, for example, Commission Regulation, *Research and development agreements*, recital 10 and the *Nungesser Case*, paragraphs 55-57. R&D is encouraged in articles 163-173 of the Treaty. Bouterse (1994), pages 27 and 28, even argues that economic progress has been used to achieve public health goals.

²⁹⁵ For a contrary view see Gyselen (2002a), page 185. He refers to Commission decisions, *Synthetic Fibres* and *Ford/ Volkswagen*, discussed below, and the *Matra Case*, in support, but does not explain how they support him.

²⁹⁶ The *obiter dictum/ ratio decidendi* distinction seems to have been accepted in Community law, see Case T-224/2000 *Archer Daniels Midland and Other v. Commission* [2003], paragraph 200.

²⁹⁷ This is because the case was ultimately decided on whether competition was eliminated. That said, the ECJ discussed including social considerations within article 81(3) over the course of five paragraphs.

²⁹⁸ This was for procedural reasons, the CFI said the Commission had not based its decision on social reasons, paragraph 107; not because social reasons are irrelevant in article 81(3) of the Treaty.

²⁹⁹ Case 45/85 *Verband der Sachversicherer v. Commission* [1987], page 430. See also, Kjolbye (2004), pages 570 and 571.

³⁰⁰ Case 40/70 *Sirena v. Eda* [1971], paragraph 5 and Case T-69/89 *Radio Telefis Eireann v. Commission* [1991], paragraphs 66-71. See also, Case 402/85 *G. Basset v. Société des auteurs* [1987], paragraphs 18 and 19.

"...even in competition law the principles of article 36 [now article 30] were applicable as the emanation of a general legal doctrine. That view can only be understood to mean that the rules of competition law must yield to the extent to which this is necessary in the interests of safeguarding the rights under article 36..."³⁰¹

The accepted position today is the one proffered by the ECJ in the *Consten and Grundig Case*, page 345, where it argued that the article 30 exemptions did not apply to article 81, but implied that the existence of intellectual property rights, as opposed to their exercise, did not fall within article 81 at all, because of article 295 of the Treaty.

While the *Sirena's* line of caselaw is not particularly convincing, the Community Courts have accepted the extension of these four heads of exemption. This can be seen in areas such as economic efficiency, increasing employment (articles 125-130 of the Treaty, especially article 127(2)), public safety (article 152 of the Treaty, especially article 152(1)), consumer protection (article 153 of the Treaty, especially article 153(2)), industrial policy, fair-trading, and the ECHR.³⁰²

The Community Courts have normally gone out of their way not to explicitly widen the 'interpretation' of these four heads more generally. However, the CFI has explicitly done so as well:

"...in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under article 85(3) [now article 81(3)] of the Treaty."³⁰³

This is very wide. It would certainly incorporate the objectives pursued by the policy-linking clauses into the article 81(3) test. It is probably even wider than that. Other objectives that have

³⁰¹ Case 262/81 *Coditel v. Ciné-Vog Films* [1982], pages 3406 and 3407. If Advocate-General Reischl is correct then one might ask whether the exemptions in, for example, article 55 of the Treaty might also be relevant.

³⁰² See, for example, **economic efficiency**, Case 48/69 *Imperial Chemical Industries v. Commission* [1972], paragraph 115, which emphasises both productive and static efficiencies; **employment**, Case 42/84 *Remia v. Commission* [1985], paragraph 42; **public safety**, Joined Cases T-213/95, etc., *SCK and FNK v. Commission* [1997], the CFI appears to be alluding to this, see paragraphs 3 and 194; **consumer protection**, see the arguments of the Plaintiff, Case 249/85 *Albako Margarinefabrik v. Bundesanstalt für landwirtschaftliche Marktordnung* [1987], page 2348 and Case C-376/92 *Metro SB-Großmärkte v. Cartier* [1994], see the opinion of Advocate-General Tesouro, paragraph 33, "...considerations relating to consumer protection...should not be unconnected with the interpretation of article 85 [now article 81] of the Treaty."; **industrial policy**, the *Matra Case*, paragraph 109; **fair trading**, Case 249/85 *Albako Margarinefabrik v. Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2345, paragraph 16 and page 2348 (although see Commission, *Article 81(3) Guidelines*, paragraph 47) and ECHR, the *VVB/VBBB Case*, paragraph 34.

³⁰³ Joined Cases T-528/93, etc., *Métropole Télévision v. Commission* [1996], paragraph 118. Also, see the *Wouters Case*, Opinion of Advocate-General Léger, paragraphs 107 and 113; Joined Cases 46/87, etc., *Hoechst v. Commission* [1989], paragraph 25; Case 85/87 *Dow Benelux NV v. Commission* [1989], paragraph 36; Joined Cases 97 to 99/87 *Dow Chemical Ibérica SA and Others v. Commission* [1989], paragraph 22, articles 3(1)(g), 81 and 82 are there "...to prevent competition from being distorted to the detriment of the public interest..." and B&C (2001), paragraph 3-044. See also, Case 14/68 *Walt Wilhelm and Others v. Bundeskartellamt* [1969], paragraph 5 and Evans (1985), page 101.

already been considered or may be ripe for inclusion include establishment of undertakings, freedom of intra-Community trade; protecting intellectual property rights; equality of opportunity, fair-trading and legitimate self-protection, regional policy (see articles 158-162 of the Treaty, especially article 159) and culture (see article 151 of the Treaty, especially article 151(4)).³⁰⁴

3.3 Conclusion of Section 3

The Treaty emphasises compromise over exclusion. Values promoted in the policy-linking clauses should be incorporated into (balanced within) other policy areas. However, it is not certain whether *all* objectives must be balanced in *every* decision taken under the Treaty. The Treaty does not specifically state whether there is room for compromise within article 81. That provision's wording does not seem wide enough for all relevant values to be considered within it. However, the emphasis on balancing competition against other objectives was reinforced by the Maastricht Treaty, which changed one of article 2's goals from "...a harmonious development of economic activities..." to "...a harmonious and balanced development of economic activities..."³⁰⁵

As demanded by article 220, the Community Courts have filled in some of the Treaty's gaps. They are generally reticent to allow decisions to be taken while relevant values are ignored. This is also true in competition policy. The Community Courts are slow to exclude competition. Furthermore, while competitiveness and competition are important Treaty objectives, they do not trump other values, but must be balanced against them.

³⁰⁴ See, for example, establishment of undertakings, Case T-30/89 *Hilti v. Commission* [1991], paragraph 100, although this was an article 82 case the ECJ has said that articles 81, 82 and the ECMR pursue the same general objectives, Case T-22/97 *Kesko v. Commission* [1999], paragraph 106; freedom of intra-Community trade, Joined Cases 100-103/80 *SA Musique Diffusion v. Commission* [1983], paragraph 107; protecting intellectual property rights, Case 395/87 *Ministère public v. Tournier* [1989], paragraph 31; fair competition, Case 32/65 *Italy v. Council and Commission* [1966], page 405, see also Anderman (1998), pages 19-21; equality of opportunity, Case C-18/88 *Régie des télégraphes v. GB-Inno-BM* [1991], paragraph 25, this was an article 82 case but, as seen above, articles 81 and 82 have been held to pursue the same objectives; fair trading, Case 249/85 *Albako Margarinefabrik v. Bundesanstalt für landwirtschaftliche Markordnung* [1987], paragraph 16 and page 2348; legitimate self-protection, Joined Cases 100-103/80 *SA Musique Diffusion v. Commission* [1983], paragraphs 89-90, not allowed in this case as the breach of article 81 was not the only means of ensuring the undertaking's survival. At page 1946, Advocate-General Slynn implied that the act from which the undertaking was defending itself should also not have been lawful if this defence is to be allowed; although the ECJ did not demand this in an action under article 60(2)(b) of the ECSC Treaty, Case 16/61 *Acciaierie Ferriere v. High Authority* [1962], at page 303; regional policy, Case T-96/92 *Comité Central d'Entreprise v. Commission* [1995] and Joined Cases C-68/94 and C-30/95 *French Republic and Others v. Commission* [1998]. As noted above, the ECMR pursues similar objectives to articles 81 and 82 of the Treaty; monetary policy, Bouterse (1994), Chapter 6; and culture, Joined Cases 209/78, etc., *Heintz van Landewyck v. Commission* [1980], paragraph 135.

³⁰⁵ Furthermore, article I-3(2) of the European Convention now reads: "The Union shall work for the sustainable development of Europe based on balanced economic growth..." Article III-1 also reads "The Union shall ensure consistency between the different policies and activities referred to in this Part, taking all of the Union's objectives into account..." Articles III-4 and III-5 preserve specific policy-linking clauses too.

In order to allow public policy balancing within article 81, the Community Courts have construed that provision against its natural meaning. Instead of focusing on article 81's wording, they have employed the teleological approach, as they do throughout the Treaty. The Community Courts have done this in relation to both article 81(1) and (3). Many values can now be balanced within article 81, including those that the policy-linking clauses embrace. These values do not form a closed list, although certain limits are discussed in Chapter Seven.

From the Community perspective, the Community Courts are right to open up article 81 of the Treaty in this way. The Treaty obliged them to choose between exclusion and compromise. The Community Courts have been able to imply many objectives into article 81. This allows for the balancing of other objectives, which deals with the fundamental conflicts problem in a way that takes adequate account of the policy-linking clauses, the relative importance of competition and the structure and objectives of the Treaty as a whole. It also allows the decision-maker to be clearer, it need not twist its reasoning into the straight-jacket of article 81's concrete wording, particularly important in a multi-lingual community. This encourages open and transparent decisions.

Black letter lawyers will not agree.³⁰⁶ They will argue that the Community Courts are wrong to re-interpret the Treaty in this way, that they have crossed the line between interpretation and legislation.³⁰⁷ Such changes should be made by way of Treaty amendment.³⁰⁸ That may be so, but this is a pragmatic solution and the Member States have had adequate opportunity to amend the Treaty if they found the Community Courts' interpretative approach unacceptable. Quite the contrary, the Council, made up of the Treaty's signatories, has constantly reaffirmed the need to take account of other policy objectives within article 81, see above.³⁰⁹

As we saw in the last chapter, economists are unlikely to agree with me either. Many believe that article 81 should only have economic efficiency as an objective and that all other policy objectives, to the extent that they should be pursued at all, should be attained using the optimal instrument. This will rarely be competition policy. But the Treaty creates conflicts and these cannot be ignored. Economists would seldom agree that competition policy should be

³⁰⁶ See, for example, the implications of Fox (1998), pages 478 and 479.

³⁰⁷ For a general critique of the Community Courts' adoption of the teleological approach, see, Craig and de Búrca (1998), pages 86-95, and the references there.

³⁰⁸ Note the more general concern of the Bundeskartellamt in this regard, in Wilks (1996), page 157.

³⁰⁹ The most 'anti-competitive' block exemption ever is Council Regulation, *Shipping Cartels*, see Townley (2004). Also see the discussion on fixed book price agreements, above. The principle has also been accepted by other Community bodies, see, for example, the European Parliament and the Economic and Social Committee on the Commission's RCP 1994, respectively paragraph 25 and paragraph 3.3.; Economic and Social Committee, *Opinion on the Twenty-fifth Report on Competition*, in Commission, RCP 1996, page 381, paragraph 2.5 and European Parliament, *Resolution on the XXVIth report by the Commission on competition policy - 1996*, in Commission, RCP 1997, page 368, point 2.

compromised or excluded and so they must argue that, to the extent that they conflict with it, competition must exclude the other objectives. If these other objectives cannot be (and are not) pursued by some other instrument, see Chapter One for why this might not be possible, they will not be taken into account at all. And yet that would be to ignore the Treaty's concrete wording, and, even worse, its underlying principles. Chapter Seven argues that article 81 can be interpreted so as to better accommodate both the views expressed in this chapter and those in Chapter One. Nevertheless, distorting competition may sometimes be the only possible solution, in law or in fact.

This chapters' introduction asked whether the influence of political considerations on competition was warranted? Chapter One discussed this from a theoretical perspective and concluded that this would sometimes (though rarely) be the case. This chapter shows that, when the question is viewed within the Treaty context, public policy's influence on article 81 is warranted.³¹⁰

4. THE COMMISSION

In this part, we focus on the second issue raised in the Introduction. In recent policy statements the Commission has said that the competition rules should not be set aside because of 'non-competition' (political) considerations. This is contrary to the structure of the Treaty, contrary to the position adopted by the Community Courts and involves a fundamental re-organisation of the hierarchy of Treaty objectives, as analysed above.

The Commission, principally DG Competition, is an important actor in relation to article 81.³¹¹ It guides the development of Community competition policy and has been given a lot of discretion for this purpose, see below and Chapter Seven.

The rest of this chapter examines: (i) the changing position adopted by the Commission in its policy statements; and (ii) whether the views that the Commission expresses in its policy statements are reflected in its decisions. What the Commission says in its *decisions* is particularly significant because it is these that bind the Member States' courts and competition authorities.³¹²

Initially, the spotlight is thrown on 1993, the first complete year of the internal market and the year of the Treaty of Maastricht, where most of the policy-linking clauses were adopted. The Commission's policy statements and decisions in 1993 are compared with those of 2000/2001,

³¹⁰ The limits of this are discussed in Chapter Four and Part C. In a Community context, these limits are currently wider than Chapter One (theory) might advocate. Chapter Seven tries to reconcile these positions.

³¹¹ Wilks (1996), page 164 and Gerber (1994), page 132-135, 137, 140 and 143-147.

³¹² Regulation 1/2003, recital 22 and article 16.

when Commission notices described 'major developments' in its analysis of vertical and horizontal restraints under article 81.³¹³

4.1 1993

In 1993, the Commission dedicated a whole chapter of its *Report on Competition Policy* (Part One, Chapter IV) to the incorporation of other Community policies into competition policy. At paragraph 149 the Commission said:

"Competition policy is an instrument which complements the Community's other policies. This chapter of the Report therefore looks at the role which competition policy can play in the implementation of such other policies."

The Commission emphasised the fact that competition policy has something to give to environmental policy, paragraph 163. This is because of the benefit of introducing into the price mechanism the polluter pays principle, internalising externalities, paragraphs 164 and 165. Indeed, in SEC(92) 1986 the Commission said that, whenever possible, integration of competitiveness and the environment requires a strategy that "...should be built around solutions based on the competitive functioning of markets."

But the Commission added that environmental policy also affects competition policy, paragraph 171. At paragraph 170 it says:

"...the Commission will examine carefully all agreements between companies to see if they are indispensable to attain the environmental objectives... The Commission in its analysis of individual cases will have to weigh the restrictions of competition in the agreement against the environmental objectives that the agreement will help attain, in order to determine whether, under this proportionality analysis, it can approve the agreement."

The same duality is noted in respect of cultural policy, paragraphs 175-177. The Commission says that it can help to preserve plurality in the media by "...ensuring that competition between firms is not distorted and that some firms do not try to oust others through anti-competitive practices.", paragraph 176. In paragraph 177 it reconciles the concerns of cultural policy with the application of the competition rules in relation to resale price maintenance systems for books. The Commission says that while it could not agree to prices, pricing methods or conditions of sale being established collectively by all publishers, it could countenance a system where these mechanisms were individual and purely vertical.³¹⁴

³¹³ Rivas and Stroud (2001), pages 935 and 942.

³¹⁴ The same applies in relation to competition policy and completion of the internal market, including social and economic cohesion. The Commission says that firms must not be allowed to reconstruct the barriers between Member States using territorial protection. The Commission tries to equate preventing barriers to intra-Union trade with economic efficiency, paragraph 154; also note, COM(93) 632, pages 28-31. Although the Commission implicitly acknowledges that there is a balance between allowing some territorial protection, which might be welfare enhancing and enforcing interpenetration of markets, see Motta (2004), Chapters 1 and 6.

The Commission clearly states that competition policy plays a role in the Community's other policies. This occurs in two ways. First, the Commission uses the market mechanism to help achieve the other objectives, see Chapter Five. Secondly, the Commission will sometimes distort competition to achieve other ends. Chapters Three and Four illustrate this mechanism in more detail.³¹⁵ These statements are in line with the framework provided by the Treaty and the Community Courts, discussed above. They also dovetail with the Commission's approach in other policy areas.³¹⁶ Although it is dangerous to talk of patterns in such a small sample, the same attitude is also prevalent in the decisions taken by the Commission in 1993.

In the OJ 1993, 16 article 81 decisions were reported.³¹⁷ Some were argued, and based, on economic criteria;³¹⁸ others focused on restrictions of economic freedom.³¹⁹ One decision considered economic criteria and the fact that interpenetration of the national markets was prevented through absolute territorial protection.³²⁰ In four decisions³²¹ the Commission explicitly invoked non-economic objectives in its article 81(3) analysis. In three of these, *Ford/Volkswagen*, *VIK-GVSt* and *EBU/Eurovision System*, non-economic objectives may have been decisive.

Once again, we see the same attitude in relation to industrial policy "The aim of competition policy is to improve the international competitiveness of Community industry." Commission, *Framework for State Aids for R&D*, paragraph 1.4, including the encouragement of SMEs and R&D, paragraphs 155-161. Competition aids them, but can also be restricted in order to help them if necessary.

³¹⁵ The Commission had already pointed to links between competition and other Community policies before 1993, see, Commission, *RCP 1976*, pages 9 and 10; Commission, *RCP 1979*, page 11; Commission, *RCP 1982*, pages 9, 10 and 12-15 and Commission, *RCP 1990*, pages 16 and 17. Sometimes the Commission went further, signalling that it was prepared to restrict competition in order to achieve other policy objectives, see, *Agence Europe*, 10 November 1978; Commission, *RCP 1980*, pages 9-11; Commission, *RCP 1982*, pages 12-15; Commission, *RCP 1988*, page 16; Commission, *RCP 1991*, pages 11, 12 and 39-48; Commission, *General Report 1992*, pages 74 and 75 and Commission, *RCP 1992*, pages 13 and 47-58. While the Commission emphasised that competition was an important objective in its own right (Commission, *RCP 1991*, point 42) this did not mean that competition policy could be "...pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.", Commission, *RCP 1992*, page 13. This point is also discussed by Kapteyn and VerLoren van Themaat (1998), pages 839 and 840; Bouterse (1994), pages 34-36, 62-66 and 77 and Hornsby (1987).

³¹⁶ See, for example, *Taking the environment into account in other policies*, Commission, *General Report 1990*, pages 214 and 215; Commission, *General Report 1991*, pages 198 and 199; Commission, *General Report 1992*, pages 4, 5 and 199 and Commission, *General Report 1993*, pages 1-5, 166 and 167. The Commission believed that the policy-linking clauses demanded the balancing of, for example, environmental protection, within other policies, see, Commission, *General Report 1991*, pages 198 and 199.

³¹⁷ The number cited here (16) does not marry with the figure quoted in the Annex (5). This is because, the Annex discusses the decisions taken in a particular year. The figure quoted here (16) relates to those decisions that were published in the Official Journal in 1993, regardless of when they were taken.

³¹⁸ For example, Commission decisions, *Langnese-Iglo* and *Schöller Lebensmittel*.

³¹⁹ For example, Commission decision, *CNSD*, this was an article 81(1) case.

³²⁰ Commission decision, *Zera/Montedison*, this was an article 81(1) case.

³²¹ Commission decisions, *Ford/Volkswagen*; *VIK-GVSt*; *EBU/Eurovision System* and *Fiat/Huachi*.

In its *Ford/ Volkswagen* decision, the Commission considers a 'foundation agreement' between two motor vehicle manufacturers, Ford and Volkswagen, setting up a joint venture company for the development and production of a multi-purpose vehicle (MPV) in Portugal. The Commission found a restriction on competition but gave an individual exemption, paragraphs 24-41. Why? The Commission placed a lot of weight on the industrial policy aspects noting "...the establishment of a new and most modern manufacturing plant using the latest production technology...", paragraph 25, as well as an advanced MPV, paragraph 26. Rationalisation of product development and manufacturing is mentioned, paragraph 25, but, on pure competition grounds, it is very doubtful that this joint venture should have been cleared.³²² The emphasis is essentially on technical progress. The environmental improvements in the product as well as its prospective low emissions and fuel consumption are also given weight in this regard, paragraph 26.

The Commission also notes, paragraph 36, in relation to the indispensability of restrictions, that the project is the largest ever single foreign investment in Portugal, leading to the creation of some 15,000 jobs. This, says the Commission, helps to promote the harmonious development of the Community through reduced regional disparities as well as furthering market integration. The Commission ends:

"This would not be enough to make an exemption possible unless the conditions of article 85(3) [now article 81(1)] were fulfilled, but it is an element which the Commission has taken into account."

The language is unhelpful. Either the Commission relied on this issue, or it did not.³²³ It seemed confident about incorporating the other Community policy objectives, it might have been more confident in relying on this, especially in the light of the *Remia Case*.³²⁴ Was it because Portugal's gain came about, at least in part, at the expense of Germany? The Commission could have spelt out the fact that it was European employment and social cohesion that was important. This would have been considered very provocative.

Commission decision, *VIK-GVS*,³²⁵ involved a set of agreements where the German electricity generating utilities and industrial producers of electricity for in-house consumption undertook to purchase a specific amount of German coal up to 1995 for the purposes of generating electricity. The agreements were part of an initiative to support the German coal-mining industry and were

³²² Jones and Sufrin (2001), page 194 and Amato (1997), pages 58-62, imply the same thing.

³²³ We have seen that on appeal, the CFI said the Commission did not rely on employment criteria. Not everyone agrees, for example, Hildebrand (2002), page 240, says "The creation of jobs in a poorly developed area was considered to be a decisive criterion to qualify for exemption." Furthermore, the CFI's view does not lie well with the Commission's submissions in that case, see the conclusion to this chapter.

³²⁴ In the appeal to the CFI the Commission gave this aspect more weight, see the *Matra Case*, below.

³²⁵ See also, Houttuin (1994), pages 63-65.

actively supported by the Federal Minister for Economic Affairs. The whole set of agreements was related to simultaneous State aid negotiations. Specifically, two agreements were considered. One between the General Association of the Coal-mining Industry (GVSt) and the Association of the German Public Electricity Supply Industry (VDEW), the other between GVSt and the Association of Industrial Producers of Electricity (VIK). The Commission found that the agreements restricted competition, paragraph 24, but granted an exemption.

The Commission found that article 81(3) was fulfilled. Electricity cannot easily be stored. So, electricity production and demand must be in constant equilibrium. Therefore, safeguarding the procurement of primary energy sources is particularly important. The agreements make energy sources available in the form of coal and thus "...promote security of energy supply in the Federal Republic of Germany.", paragraph 31. In fact what was at stake was not that so much, but the security of energy supply in Germany *of electricity from German coal*.

The third relevant matter is Commission decision, *EBU/ Eurovision System*. This related to the company statutes of the European Broadcasting Union, an association of radio and television organisations, other rules governing the acquisition of television rights to sporting events, the exchange of sports programmes within the framework of Eurovision and contractual access to such programmes for third parties. In order to be a member of the EBU an undertaking must be within the European broadcasting area, provide a service of national importance; be at least trying to cover the whole of their national territory and must provide a mix of programmes, including a substantial proportion under their own editorial control. The EBU has 67 active members and 54 associate members (those not in the European broadcasting area), from 47 countries.

The Eurovision System (ES) is a network for the exchange of television programmes, including sport programmes, which also operates a system of joint acquisition of television rights to international sporting events. All interested members that want these rights to international sporting events then jointly acquire them and share the fee. Members cannot bid for rights against the ES. If two members from the same country want the rights they have to split them amongst themselves. Programmes made in the Eurovision area are produced by a member in the country concerned and are then made available to all members via the Eurovision programme exchange system. This is done free, on the understanding that it will be reciprocal. If the programme is made outside the Eurovision area, sometimes they pay a fee, shared between those that broadcast it, although sometimes reciprocity exists there too. There is also some administrative and technical co-ordination provided by the EBU's permanent staff. The EBU have agreed to grant access to Eurovision sports programmes, on conditions to be freely negotiated, but not less favourable than agreed with the Commission, paragraphs 36-40.

The Commission found restrictions on competition between the EBU members as sometimes countries have more than one member and so they would normally compete for rights, also some companies broadcast in other countries too so there would be competition there. Competition is essentially eliminated here, paragraph 49. There was also a distortion of competition regarding non-members as they cannot participate in the EBU savings, paragraph 50, allowing EBU members to strengthen their market position, paragraph 51.

In relation to article 81(3) the Commission found a number of benefits and granted an exemption. Regarding the joint acquisition and sharing of the rights these reduce transaction costs and ensure that negotiations are carried out in the most competent manner (using local experts etc.), this benefits smaller members, paragraph 59. It also encourages programme co-ordination at the national level, as members negotiate to share the events, which often means more complete coverage, paragraph 60. At the international level it facilitates cross-border broadcasting, as members generally get the rights not just in their country, contributing to the development of a single European broadcasting market, paragraph 61. Participation in a transnational dedicated sports channel (a joint venture between a consortium from EBU and News International/ Sky) also enables EBU members to provide a broader range of sports programmes (including minority sports), giving viewers a broader choice, but also bringing money to the organisers of minority sports and contributes to the development of a single European broadcast market, paragraph 62. In relation to the exchange of the television signal the Commission said that it resulted in considerable rationalisation and cost savings, helping smaller broadcasters especially. It also encourages dissemination because if an event is in a country and the local broadcaster is not interested, e.g. no national champion involved, it still sends the signal to others, leading to more sports programmes, especially minority ones, paragraph 63. The administrative and technical co-ordination is also very helpful, paragraph 64. It also provides for a reliable common network, which also leads to rationalisation etc., paragraph 65. The access rights for non members reduces the restriction on competition as well as providing a one stop shop and increasing demand for second transmissions of events, paragraphs 66 and 67.³²⁶

Economic considerations were important in this decision. However, this comes through most at the end of the decision. The Commission emphasises arguments relating to SMEs, cultural exchanges and the aiding of the cross-border broadcasting in this process. Is this because these factors were more important?

³²⁶ See also, Forrester (1998), page 376.

Both Commission practice and policy seem³²⁷ in line with the Treaty, the Community Courts' caselaw under article 81 and the Commission's policy statements. The Commission considers many other objectives in its analysis, primarily under article 81(3) of the Treaty. This is often done by balancing objectives outside of the market mechanism, i.e. essentially by reducing competition.

In my view, there are two problems with the decisions. First, the Commission could be clearer about the weight of factors in the balance and the mechanism it uses for taking these issues into account and balancing them, Sections B and C discuss this issue. Secondly, the Commission could provide more help on which types of objective are relevant, for example, is it only Treaty objectives or should Member State values be considered too, see Chapters Four and Seven?

4.2 2000

The Commission's policy statements reaffirmed the need to balance competition objectives with other values (within article 81) after 1993 too.³²⁸ That said, by 1997 the Commission's policy statements were somewhat ambiguous. The Commission announced its intention to modernise Community competition law.³²⁹ It hailed its Communication on vertical restraints as an example of its innovative stance. This communication, said the Commission:³³⁰

"...breaks with a method which was differentiated by industry and category of agreement, and has become extremely complex. It is based on the economic analysis of the effects of vertical restraints; exemption is to depend on the market power of the firms involved."

What does the fact that the basis is now economic analysis mean? It may indicate that, the *only* relevant issue when analysing vertical restraints, and maybe even article 81 as a whole, is their effect on economic factors? Let's call this the 'pure economic approach'.³³¹ On the other hand, it

³²⁷ I cannot say stronger than 'seem'. The Commission votes on these competition decisions as a college, this is a closed political process. It might be that, in order to guarantee the vote of the Commissioner for research and innovation, certain extraneous words are added to the decision, highlighting the importance of innovation, as in *Ford/ Volkswagen*. This might be so, even if the decision was taken solely on efficiency grounds. This is probably not what happened in the three decisions discussed here, as the heart of the exemption logic does not seem to be efficiency orientated. Nevertheless, if this process takes/ took place, it shows that DG Competition have not 'won' the argument that article 81 decisions should ignore non-economic objectives.

³²⁸ See, Commission, *RCP 1994*, pages 19-21 and 23-26; Commission, *RCP 1995*, pages 40 and 41; Commission, *RCP 1996*, pages 7, 8, 17, 18 and 32-34, at page 9 Commissioner van Miert called for "...a balanced competition policy which pays due regard both to the pressing need for economic efficiency and to the general interest."

³²⁹ See the references in Commission, *RCP 1998*, pages 20-22, for example.

³³⁰ Commission, *RCP 1998*, page 21.

³³¹ Ehlermann (2000a), page 549, offers a refinement of this position. He says "It would probably be an exaggeration to assume that, according to the Commission, non-economic considerations are to be totally excluded from the balancing test required by article 81(3). Such an interpretation would hardly be compatible with the Treaty, the Court of Justice's caselaw, and the Commission's own practice. However, the passage quoted [Commission, *White Paper on Modernisation*, paragraph 57, see this chapter's Introduction] is a clear indication that non-competition-orientated political considerations should not determine the assessment under article 81(3). I fully subscribe to this

could refer to the fact that the old system of analysis and block exemptions was very rule-based. The old system differentiated between the category of agreement that was involved, the number of parties, etc.³³² Perhaps the Commission means that it will move towards economic analysis, as opposed to the straight-jacket segmented approach of old, *while maintaining the relevance of other objectives* within article 81? Let's call this the 'mixed economic approach'.

Sometimes the Commission's policy statements only infer a mixed economic approach.³³³ This would still be an important shift, as the Commission's economic analysis has often been criticised.³³⁴ The Commission has emphasised the fact that recent judgments of the Community courts are forcing it to apply better economic reasoning in its decisions.³³⁵ It is attempting to respond to this challenge.³³⁶ This is welcome. Such a change would also bring Community competition law more into line with other jurisdictions' competition policy. This is important for undertakings in an ever-shrinking world, see Chapter Six. A mixed economic approach would not affect the analysis in this thesis, except insofar as it is considered in Chapter Six.

However, as we saw in the Introduction to this chapter, at times the Commission has gone further and advocated a pure economic approach. This is the implication in the last sentence of the previous citation, for example.³³⁷ A pure economic approach would be a major policy shift

approach." Monti (2002) adopts a similar position. That said, if political considerations can *never* set aside economic ones (determine the assessment), then their presence in article 81(3) is largely academic.

³³² See, for example, Verouden (2003), pages 526 and 527 and the references made there; Bishop and Ridyard (2002), page 35; van der Woude (2002), page 41; Whish (2000), page 889 and Nazerali and Cowan (1999), page 159.

³³³ See Forrester and MacLennan (2001), pages 380 and 381. See, for example, COM(96) 721, paragraph 86; Commission, *RCP 1998*, pages 19 and 20; Commission, *RCP 1999*, pages 7 and 23; Commission, *RCP 2000*, paragraph 23; Mario Monti (2003a) and Mario Monti (2003), "In making this revision, we have shifted from a legalistic based approach to an interpretation of the rules based on sound economic principles."

³³⁴ See, Verouden (2003), page 565 and references mentioned there; Whish (2003), pages 1 and 2; Hildebrand (2002), page 161; Whish (2000a), pages 889-892; Venit (1998), pages 567 and 569 and Neven, Papandropoulos and Seabright (1998).

³³⁵ Commission, *Horizontal Guidelines*, paragraph 6.

³³⁶ Commission, *RCP 2000*, Introduction by Commissioner Monti.

³³⁷ Also see, Mario Monti (2002), "We should all now ensure that these [competition laws] are effectively used to foster competition in the interest of consumers, and not as a disguised instrument of industrial or social policy or, even worse, as a protectionist instrument."; Commission, *Article 81(3) Guidelines*, paragraphs 13, 21 and 33, "The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources." Paragraph 42 appears to be broader in scope "Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of article 81(3)..." This was probably not the intention. Paragraph 43 reiterates: "The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective." See also, Regulation 1/2003, recital 9; Commission, *Vertical Guidelines*, paragraphs 7 and 136 and Commission, *Horizontal Guidelines*, paragraphs 4, 32, 102, 103, 132, 151-153 and 169-170; although note paragraphs 192-194 and 197, in relation to environmental agreements. See also, Commission, *RCP 1999*, page 19; COM(98) 544, pages 4, 5 and 22, which only mentions consumer welfare and market integration objectives, "Competition rules are economic rules...", page 22 and Commission, *Transfer of Technology Block Exemption Evaluation Report*, paragraph 31.

and would clash with both the Treaty framework and the Community Courts' interpretation of it, see above.³³⁸ It would also conflict with the Commission's increasing acceptance (at least outside of competition policy) of the need to integrate the different policy areas.³³⁹

If the Commission has adopted a pure economic approach, I have not seen it justify this shift, although sometimes it *implies* that article 81 (and the other competition provisions) are merely there to implement article 3(1)(g) of the Treaty.³⁴⁰ There is rarely any discussion about the significance of the policy-linking clauses in such a reading of the Treaty. However, when they are highlighted, the implication is that they do mean that other objectives should be considered within article 81.³⁴¹ It is hard to reconcile these two positions. The fact that there is ambiguity on this fundamental issue is unacceptable. There is very little discussion about this in the literature. Many academics simply conflate the issues and assume that the Commission now advocates a pure economic approach, possibly tempered by the market integration objective.³⁴² The last Director-General of DG Competition reinforced this:

"Political, social or environmental aspects, in my view, have no place in the direct application of competition law."³⁴³

In conclusion, it is unclear whether a pure economic approach has now been adopted. The Commission may not even have made up its own mind on the issue. In the draft version of Commission, *Article 81(3) Guidelines*, paragraph 38, after accepting that goals pursued by other

³³⁸ Wesseling (1999), pages 421-424. See also the citation above from Ehlermann (2000a), page 549.

³³⁹ See, for example, Commission, *General Report 1997*, page 3 (employment) and 5, 190 and 191 (environment); Commission, *General Report 1998*, pages 2 (employment), 5, 168 and 169 (environment), 87, 145-147 and 169-171 (industry and environment); COM(1999) 587; Commission, *General Report 1999*, pages 3, 136-138, 143, 144, 157-159 and 252 (environment); Grimeaud (2000), Section 2; Commission, *General Report 2000*, pages 413 (in general), 3, 168-170, 191 and 257 (environment), 5 and 263 (development policy), 82-85 (enterprise); 182-184 (energy); 207 (public health); COM(2001) 486; Commission, *General Report 2001*, pages 2, 3 (in general), 98-102 (enterprise), 113, 143, 189-198, 211, 287 (environment), 205-207 (energy); Commission, *General Report 2002*, pages 24 (in general), 3 (employment and social cohesion), 106 and 109-113 (enterprise), 125, 153, 230 and 231 (energy), 140 (economic and social cohesion), 153, 211-215 and 237 (environment), 219 -222, 248, 253 and 256 (public health and consumer protection); COM(2002) 276 and Commission, *General Report 2003*, pages 155 (economic and social cohesion), 169, 186, 224-226 and 229-232 (environment), 236 and 239 (energy), 258 (health and consumer protection), 293, 297 and 299-301 (development policy).

³⁴⁰ Case C-35/96, *Commission v. Italy* [1998], in paragraph 47 of Advocate-General Cosmas' opinion, the Commission is cited as saying that "...Community competition law is autonomous, not solely in relation to national law but also in relation to other rules of Community law." Is this the implication in Commission, *RCP 1999*, page 11, too? Also see, Commission, *RCP 1996*, point 2. That said, the Commission is not even consistent in this regard, see, COM(1999) 587, point 7 and Commission, *RCP 1992*, page 13.

³⁴¹ The quote from Commissioner Monti from 1999, reported in Cunningham (2001), pages 156 and 157, strongly supports the integration of cultural objectives into article 81 because of article 151(4) of the Treaty, for example. See also, Commission, *RCP 2000*, pages 39 and 40, cited below.

³⁴² Gilliams (2005) *DRAFT*, pages 25 and 26; Venit (2003), pages 578 and 579; Bishop and Walker (2002), paragraphs 1.04-1.09.

³⁴³ Schaub (1998), pages 9 and 10.

Treaty provisions could be taken into account, to the extent they fell within article 81(3), the Commission added:

"It is not, on the other hand, the role of article 81 and the authorities enforcing this Treaty provision to allow undertakings to restrict competition in pursuit of general interest aims."³⁴⁴

In the final version of these guidelines this sentence no longer appears, see paragraph 42. The Commission does not explain this change. Perhaps it now believes that undertakings can restrict competition in pursuit of general interest aims? Perhaps it doesn't want to draw attention to the debate? There is little point speculating. However, *if* a shift to a pure economic approach has occurred, three points must be discussed:

- Why did the Commission suggest such a change?
- Can the Commission change its policy like this?
- What has been the effect of the change on the Commission's article 81 decisions?

In relation to the first question, there are a number of possibilities. DG Competition believes in the value of efficient markets, see Chapter One. Indeed, there is a general trend among competition authorities to focus their interpretation of the competition rules on economic criteria, see Chapter Six. Perhaps DG Competition is merely following suit? Increased emphasis on pure economic criteria has been pushed by the appointment of Commissioner Monti in place of the more pragmatic van Miert.³⁴⁵ Perhaps the Commission believes that economic criteria are easier for undertakings to understand, giving greater predictability to the competition rules than a political balancing test could ever bring? Chapter Six discusses whether or not economic criteria are in fact easier for undertakings to understand.

The second motivation may be that DG Competition is tired of the short-termism of the political interference that it receives, both from outside³⁴⁶ and from within³⁴⁷ the Commission. By highlighting the importance of economic factors, it may hope to reduce the level of such

³⁴⁴ This may reflect the position of Ehlermann, cited above in Ehlermann (2000a), page 549. The Commission did not justify this assertion in paragraph 38, although it cited two cases to support it. They were both irrelevant.

³⁴⁵ Commissioner Monti has said "When I was appointed Competition Commissioner four years ago, one of my main objectives was an increased economic approach in the interpretation and enforcement of European competition rules.", Mario Monti (2003a). The Commissioner's influence was mentioned in the Introduction.

³⁴⁶ Schaub (1998), pages 475-476; Jenny (1998), page 25 and McGowan and Wilks (1995), pages 158 and 159.

³⁴⁷ See a brief discussion and references in Wilks (1996), pages 156-157 and McGowan and Wilks (1995), pages 158, 160 and 161.

interference.³⁴⁸ Chapter Seven notes that some dialogue is important, especially where there are diagonal conflicts.

Another possibility is that the Commission is saying is that it wants, at the very minimum, to assess the economic value of these various Treaty objectives, so that it can simply calculate whether or not to allow an agreement mathematically? We will see its struggle to make this sort of calculation in the *CECED* decision, see Chapter Eight.

Alternatively, the Commission may emphasise the importance of economic criteria in order to make its decentralisation initiative more palatable for those that will have to implement article 81(3) of the Treaty?³⁴⁹ This strategy risks offending those Member States, such as France and Germany, that believe that industrial policy's influence on competition law should be increased.³⁵⁰ But even they may favour change if the Commission overtly adopts a pure economic approach. Decentralisation is likely to increase the politicisation (as well as rent-seeking behaviour) that DG Competition so dislikes, see above.³⁵¹ This risks skewing competition policy as it has thus far been defined by the Commission.³⁵² Member States such as France and Germany may see decentralisation as the best way of combating a pure economic approach by the Commission, as it brings power to their own courts and competition authorities, which they can more readily influence.

Finally, the Commission may feel that it is better to have a strong (economics-based) general rule for all. In many cases, agreements will have little appreciable effect on non-economic objectives. Furthermore, Chapter One and Part B show how pursuing economic efficiency can simultaneously help achieve many other objectives. Perhaps the Commission thinks that this is generally sufficient? Where it is not, Regulation 1/2003, recital 14 and article 10, reserves the Commission's right "...where the public interest of the Community so requires..." to find that

³⁴⁸ Burnside reports the current Commissioner for DG Competition as having said that one of his prime functions is to protect the Merger Task Force from political pressure, the same may apply to the rest of DG Competition, Burnside (2002), page 110.

³⁴⁹ Monti (2002), page 1092. This is also the implication of Jones and Sufrin (2001), page 192; Hawk (1998), pages 324 and 325 and Ehlermann (1998), page xi.

³⁵⁰ See, *Premier Forum Franco-Allemand sur la Politique de Concurrence Européenne*, in *Bulletin Quotidien Europe*, Number 8627, 21 January 2004, page 13 and *Bravura Nonsense and Creating European Business Champions*, *The Economist*, 22 May 2004. See also, "Selon des sources diplomatiques, Paris et Berlin poussent M. Durao Barroso...de rétablir un certain équilibre au sein de la Commission, notamment au détriment de la direction de la concurrence, jugée trop libérale." *M. Barroso a été officiellement nommé président de la Commission européenne*, *Le Monde*, 29 June 2004 and *La difficile émergence de l'entreprise européenne*, *Le Monde*, 7 July 2004.

³⁵¹ Lafuente (2002), page 166.

³⁵² Verstrynge (1988), page 5.

article 81 does not apply.³⁵³ However, balancing would still be necessary even if only market integration and consumer welfare remained as article 81 objectives, see Chapter Eight.

Can the Commission change its application of article 81 in this way? Chapter Seven discusses this issue in some detail. The policy-linking clauses are directly effective, the Commission cannot simply ignore these and other relevant Treaty objectives. It has a duty under article 211 of the Treaty to "...ensure that the provisions of this Treaty...are applied..." Nevertheless, the Commission has a wide discretion under article 81(3) and can decide what weight to give these values in the balance. This can dramatically affect their importance within article 81, see Chapter Seven. The same applies when the Member States' authorities apply article 81. This makes our third question even more important.

Has the Commission's competition policy in fact changed? In the OJ 2000 there were 6 Commission decisions under article 81. Some were purely argued and based on economic criteria.³⁵⁴ One decision seems to have been based on both economic efficiency and freedom criteria.³⁵⁵ However, in three decisions the Commission explicitly invoked non-economic objectives, which may have been decisive.³⁵⁶

The first was *GEAE/ P&W*, which concerned a co-operative joint venture³⁵⁷ to supply a new aircraft engine for the envisaged Airbus A3XX aircraft. The Commission found that it breached article 81(1) of the Treaty. The Commission cleared the joint venture under article 81(3). It noted the strict performance targets of the new engine, paragraph 79, and said that co-operation would lead to a technically advanced engine, being less expensive in maintenance and cost per passenger and per mile covered and would have lower gas and noise emissions, the latter two are environmental considerations. The Commission also noted that the engine could be developed more quickly through co-operation³⁵⁸ and that this would also bring substantial cost savings, paragraph 80. The promised technical advances at a reduced cost were perhaps the most important criteria. If this were the case then the agreement could have led to more *ex post*

³⁵³ As early as 1993 the Commission seemed to envisage that it would concentrate on agreements raising particular political, economic or legal significance for the Community, leaving cases with less of a Community public interest to the courts and competition authorities of the Member States, Commission, 1993 *Co-operation Guidelines - National Courts*, paragraphs 13-15.

³⁵⁴ For example, Commission decisions, *Intrepreneur* and *FETTCSA*.

³⁵⁵ Commission decision, *FEG and TU*, this was an article 81(1) case.

³⁵⁶ Commission decisions, *GEAE/ P&W*; *Eurovision* and *CECED*. *Eurovision* was successfully appealed, though not on grounds relevant to our discussion, Joined Cases T-185/00, etc., *Métropole Télévision and Others v. Commission* [2002].

³⁵⁷ The case was notified on 26 September 1996, this was before the Merger Regulation was adopted.

³⁵⁸ It is not clear why this is relevant because there was no aircraft with the specification for this engine yet and the Commission seemed to imply, paragraph 71, that the parties were potential competitors within the required timeframe.

competition. This seems to penalise Rolls Royce, as it already had an engine that it intended to adapt, which is a lot cheaper to do. This may have been a short-term political decision, based more on Airbus' need for a cheap engine than anything else.

The next Commission decision of interest was *Eurovision*. This dealt with the EBU agreements that we saw in 1993. The EBU's rules had changed, although not really for our purposes. Once again, the Commission found a restriction of competition, paragraph 72. The Commission granted an article 81(3) exemption. It found an improvement in the production or distribution of goods, etc. in relation to the joint acquisition of rights for the same reasons as before, paragraph 85, this also seems to be a cultural criterion. The Commission found that the agreement reduced transaction costs, for the same reasons as before, paragraph 86. There is some indication that the underlying issue for the Commission was either SMEs, or small countries (once again cultural). In my view, the cultural aspect is the most important for the Commission. Paragraph 87 reinforces this suggestion:

"...as a result of this joint acquisition more sporting events are broadcast by a larger number of broadcasters. The resulting better coverage of the sporting events improves distribution."

The Commission finds that the sharing of the Eurovision rights leads to improved distribution, for the same reason as before, paragraphs 88 and 89. As regards the exchange of the Eurovision signal the Commission said, paragraph 105:

"As a result of the reciprocity and solidarity principles of the Eurovision system as set out in the EBU statutes, any EBU member will be obliged to produce free of charge the television signal for events taking place in its country, even if it is not itself interested in the event, in order to enable other interested EBU members to show the event. This leads to more sports programmes being produced and shown on television. Therefore, distribution is improved."

The same definitional point about distribution occurs here, as was noted above in the 1993 case.

Finally, Commission decision, *CECED*, examines an agreement between CECED, a Brussels-based association comprising manufacturers of domestic appliances and national trade associations, and its members. These companies made up some 95% of the relevant market, paragraphs 8 and 24. The agreement concerned the market for domestic washing machines in the European Economic Area. The Commission found that the agreement breached article 81(1) as the parties to the agreement bound themselves "...to cease producing and/ or importing into the Community..." certain categories of washing machines on criteria relating to their energy efficiency, paragraphs 19 and 20, reducing consumer choice and technical diversity, paragraph 32. The agreement will, said the Commission, appreciably raise production costs, paragraph 34, this might reduce demand, paragraph 35. It will also reduce the demand for electricity, paragraph 36.

The Commission cleared the agreement under article 81(3) of the Treaty. As the agreement was designed to reduce washing machine energy consumption, the machines that would be produced as a result would be more technically efficient, indirectly leading to less pollution from energy generation.³⁵⁹ The Commission called this more "economically efficient", paragraph 48. The Commission remarked at the speed of these changes, paragraph 49. The Commission also underlined that R&D was likely to focus on improved energy efficiency; thus, in the long run, there would be more product differentiation on this category, paragraph 50. The Commission focuses on economic benefits to consumers. It noted a higher initial purchase price but thought that savings on electricity bills would compensate for this, paragraph 52. It added that there are also collective environmental benefits. It noted article 174 of the Treaty, paragraph 55, and added:

"Agreements like CECED's must yield economic benefits outweighing their costs and be compatible with competition rules..."

The Commission then looks at the economic costs of pollution. It mentions the cost of avoiding the carbon dioxide and sulphur dioxide emissions, which the energy efficiency will cause and said, paragraph 56:

"On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines."

The Commission concludes that the expected improvements to energy efficiency, the cost-benefit ratio of the standard and the return on investment for individual users suggest that the agreement will contribute significantly to technical and economic progress, paragraph 57.

The Commission's public policy statements have potentially changed dramatically since 1993. However, there does not seem to have been a change in the Commission's decision-making practice over the same period. Of course formal decisions are only a small part of DG Competition's workload as most cases are dealt with informally.³⁶⁰ But precisely because of the signalling impact of its decisions, one would expect the Commission to pay special attention to the language that it uses there, see below.

The *GEAE/P&W* decision seems primarily based on political criteria of a sort that do not often arise. *Eurovision* is interesting for two reasons. It is essentially the same case as the 1993 one, so it provides an interesting point of comparison. The Commission adopts a similar logic in both

³⁵⁹ Although the Commission noted that this would be more efficiently tackled at the stage of electricity generation, paragraph 51, see article 174 of the Treaty "...environmental damage should as a priority be rectified at source..."

³⁶⁰ See, Commission, *RCP 2001*, page 53, figure 2.

decisions.³⁶¹ The 2000 decision actually discusses the transaction cost and other 'economic' savings less than it did in 1993. This may be because it is more willing to rely on other policy objectives, although it could be because the Commission felt that it had already made out its case in 1993.³⁶² While the Commission does consider economic criteria, it mentions improved transaction costs,³⁶³ this does not appear to be the focus of the case. The focus is SMEs or small countries,³⁶⁴ and the cultural policy dimension. The Commission discusses improvements of distribution, not as in better modes of communication but in terms of more distribution. This is important as it may make it easier to consider cultural criteria into article 81(3) of the Treaty. Article 151(4) says that the reason that the Community shall take account of cultural aspects is, in particular, to "...respect and promote the diversity of its cultures." Agreements that encourage/ facilitate the dissemination and appreciation of this diversity are surely instrumental to this goal, see article 151(2) of the Treaty.

The *CECED* decision is also important. The Commission's mechanism for introducing the environmental issue is through the improvement to technical progress. It is easy to define this in terms of environmental goals, and the Commission seems happy doing this,³⁶⁵ it is the first thing it discusses. Then, paragraph 48, the Commission twists this into an economic efficiency argument. This seems contrived. The agreement does not add new, more energy efficient machines, at least in the medium term. The paternalism that the Commission exercises in removing consumer choice to spend more now on a machine and less later or vice versa is less convincing from an economic perspective as there is no discussion about the current time value of money, nor the fact that consumers do not, in fact, seem to prefer to spend more now and pay later. It gets worse. The Commission assesses the cost of cleaning up the pollution that would have been caused if the predicted number of consumers that the agreement will force to switch to the new efficient machines did not take place. It estimates this at seven times the increased

³⁶¹ Other Commission decisions also demonstrate continuity in their use of Community objectives under article 81. See, for example, (i) *International Energy Agency*, OJ 1983 L376/30 and OJ 1994 L68/35 (national security and consumer protection, paragraphs 29 and 6 respectively) and (ii) *Bayer/BP Chemicals*, OJ 1988 L150/35 and OJ 1994 L174/34 (industrial policy, paragraphs 28-31 and 6 respectively).

³⁶² Tactically, it would have been sensible for the Commission to rely more on other policy goals in 2000, considering the wide discretion it is given there and the pending appeals.

³⁶³ Although there does not seem to be any discussion of the effect that these systems might have on reducing revenue for firms that put on sporting events and thus reducing distribution.

³⁶⁴ To the extent that the Commission relies on the solidarity principle to show that they are able to offer a better service.

³⁶⁵ See, Commission, *RCP 2000*, pages 39 and 40, "Article 6 of the EC Treaty stipulates that Community policy on the environment must be integrated into other Community policies. Environmental concerns are in no way incompatible with competition policy, provided that restrictions of competition are proportionate and necessary for achieving the environmental objectives pursued." The Commission says that the principle is clearly illustrated by the *CECED* decision where it took account of the positive contribution to the EU's environmental objectives, for the benefit of present and future generations.

purchase costs. But no one would have to pay these environmental costs. The externalities are not internalised.³⁶⁶

The decision is dressed up in economics. That said, environmental factors probably had some impact, see Chapter Four. Once again, even on this basic issue the decision is unclear. This is unacceptable. Furthermore, if environmental policy is the real reason for this decision, why didn't the Commission just say so? To my knowledge the Community Courts have not expressly countenanced the inclusion of environmental policy considerations in article 81, but there is every reason to suggest that they would, see above.

4.3 Conclusion of Section 4

Has the Commission changed its position since 1993? Its public statements on the objectives of competition policy seem to have changed. They almost exclusively emphasise the economic effects of agreements. This chapter suggested five possible reasons why the Commission might advocate a shift to a pure economic approach, if indeed it has. In my view, the need to convince Member States' courts and competition authorities that article 81(3) would not be too hard for them to apply was very influential. This is because the Commission, *White Paper on Modernisation* makes the clearest call for a pure economic approach. If this is the case, then, now that Regulation 1/2003 has been adopted, the Commission may distance itself from such a strong position.³⁶⁷ We saw some evidence of this in paragraph 42 of the Commission, *Article 81(3) Guidelines*, above. However, this is not the whole story. The Commission's language shows that economics, and within that consumer welfare, is becoming its preferred tool for article 81 analysis, see the Introduction and Chapter Six. Well and good. But where this fails to achieve the "optimal balance", the Commission must be prepared to promote other objectives by distorting competition, see also Chapter Seven.

The Commission still seems to be pursuing many objectives within its decisions. I say seems to be, because it does not always admit it and often tries to disguise the fact.³⁶⁸ It considers

³⁶⁶ At paragraph 55 of its decision, the Commission refers to the European Parliament and Council Decision, *review of 'Towards Sustainability'*, which says that environmental agreements must respect the competition rules. This is circular. Before this provision can be interpreted we must decide whether environmental considerations can be balanced within article 81. If we adopt a pure economic approach, then only two types of environmental agreements are possible. Those that have non-appreciable restrictions and those that are efficiency enhancing (and also comply with the rest of article 81(3)). However, if we decide that a mixed economic approach is the correct one, as the Community institutions seem to have done, then saying that environmental agreements must respect the competition rules adds very little at all and simply begs the question, how much environmental protection is acceptable under these rules?

³⁶⁷ The Commission has said that decentralisation will not alter the substantive content of articles 81 and 82, Commission, *RCP 2002*, page 25. Komninos (2005) *DRAFT*, pages 1-4 and Venit (2003), pages 546 and 575-579, greet this assertion sceptically.

³⁶⁸ This is criticised in Amato (1997), page 62 and Korah, V., in Ehlermann (1998), pages 525-541.

objectives protected by the policy-linking clauses, as well as those found more generally in the Preamble and article 2 of the Treaty.

Those agreements that justify a formal Commission decision are probably more likely to require this difficult balancing of objectives.³⁶⁹ However, if the Commission's strategy were not to take account of these anymore, where better to show that than in its decisions?³⁷⁰ This is even more the case since 1 May 2004, given the importance placed on Commission decisions. If decentralisation is to work properly, there must be trust between the Commission and the Member State bodies.³⁷¹ Without honesty, there cannot be trust, see Chapter Eight.

In its policy statements, the Commission has been neither clear, nor consistent, about the importance of 'non-economic' objectives within article 81. This issue is highly controversial and it is likely that different voices within the Commission are pulling in opposite directions. Part C makes many policy recommendations about how the Commission should resolve this issue. It is urgent that the Commission rapidly develops a clear policy, in line with the Treaty and the Community Courts' jurisprudence. In the meantime, the Commission should resist the temptation to descend into blind opportunism, as that complicates the position for all actors. What do I mean by blind opportunism?

The *VBVB/VBBB Case* (1984) involved two booksellers and publishers associations that were seeking to overturn a Commission decision, which had found some of their agreements incompatible with article 81. The ECJ asked the Commission to define, page 48, the scope of its powers to take account of the specific cultural nature of the product and the market in question, under article 81(3) of the Treaty. The Commission, *in order to justify its decision not to grant an exemption*, replied:

"As far as the specific cultural nature of the product is concerned the Commission feels, as far as concerns the choice of objectives which may play a part in connection with the application of article 85(3) [now article 81(3)], that it cannot depart from the criteria which it lays down; at the most it might have regard to purposes closely bound up with the criteria set out in that article.

The specific cultural nature of the product cannot be related to the concept of improving production or distribution. Article 85(3) does not permit the Commission to conduct a cultural policy."

³⁶⁹ Commission, *1993 Co-operation Guidelines - National Courts*, paragraphs 13 and 14.

³⁷⁰ Bouterse (1994), page 33, Bouterse, citing Sporman (1968), page 133, argues that one reason why the Commission actually takes a decision in this area is because they are test cases and that this "...implies that the decisions which were issued have a significance which goes beyond the facts of the relevant case." Forrester and Norall (1993), page 428, agree.

³⁷¹ Bos (1995), pages 410 and 411.

The Commission undermined its position in the *Matra Case* (1994), paragraph 96, by arguing, *this time trying to justify an apparently generous exemption decision*, that:

"...it is possible to take into account, as regards the contribution to economic and technical progress, factors other than those expressly mentioned in those provisions. They include, for example, the maintenance of employment and, in that regard, the applicant cannot establish a correlation between the opening of the Setúbal site and the closure by the founders of industrial sites elsewhere in Europe. Accordingly, regional policy concerns may be taken into consideration, for the purposes of article 85(3) [now article 81(3)] of the Treaty, in conformity with the requirements of article 130A [now article 158] of the EC Treaty."

Both transparency and consistency are needed, and they are needed now.

5. CONCLUSION OF CHAPTER TWO

This chapter set out to answer two questions. In a Community context, is the influence of political considerations on article 81 warranted? Secondly, given its continued importance under Regulation 1/2003, what is the Commission's view about the place of such objectives within that provision?

Both the structure of the Treaty and the presence of the policy-linking clauses create the possibility of conflicts in Community law. The Treaty normally prefers compromise, but sometimes it is silent. The Community Courts have had to fill these gaps. While doing so, they had to choose between exclusion and compromise. In the vast majority of cases, including those related to article 81, they have chosen compromise.

The Community Courts have facilitated the work of article 81 decision-makers by interpreting article 81(3) very widely, such that all Community public interest issues can probably now be taken into account there and certainly the objectives set out in the policy linking clauses. This allows the decision-maker to aim at an "optimal balance" of the various objectives that are relevant in each case.³⁷² I believe that, in a Treaty context, this is the right approach to take.

Chapter One's conclusions and those in this chapter do not appear to mesh perfectly. Nevertheless, we cannot be categorical about this until the limits of article 81's balance are fully investigated, see Chapter Four and Part C. Chapter One's conclusions colour some of my policy recommendations, particularly those in Chapter Seven.

Then I examined the Commission's position. It is creating a lot of ambiguity by publicly implying that public policy concerns are irrelevant in article 81 decision-making. The Commission is not able to make such a policy change as it is bound by the Treaty and the Community Courts' judgments. That said, the Commission has considerable discretion about

³⁷² Chapter Seven discusses which objectives can be considered.

how to balance different values within article 81, see Chapters Seven and Eight. It is acceptable for the Commission to focus on economic analysis within article 81; however, this must be tempered by other approaches where this does not adequately take account of other relevant objectives.

In practice the Commission seems to be following the Community Courts' lead in its decisions. Many objectives are regularly considered within article 81, see Part B for a detailed analysis of how and where the Commission does this. Chapters Six and Seven make policy recommendations about how best to do this, in line with the Treaty. Chapter Eight provides a framework for the balancing process within article 81.

The Treaty aims to achieve a number of goals. These include economic and social cohesion, environmental protection, public health, consumer protection, industrial policy and culture. Competition lawyers often focus solely on their area, forgetting the context of the rules that they apply.³⁷³ This is a mistake.³⁷⁴ In the words of van Miert:

"Competition policy has so long been a central Community policy that it is often forgotten that it is not an end in itself but rather one of the instruments towards the fundamental goals laid out in the Treaty - namely the establishment of a common market, the approximation of economic policy, the promotion of harmonious development and economic expansion, the increase of living standards and the bringing about of closer relationship between Member States. Competition therefore cannot be understood or applied without reference to this legal, economic, political and social context."³⁷⁵

The Treaty tries to achieve its aims using a variety of tools. One of these, an important one, is competition law. But, as with all systems of governance, conflicts arise between objectives.³⁷⁶ The Treaty itself balances competition considerations against other basic goals both within and without the Treaty provisions on competition. The highest court of appeal in this system, the ECJ, regularly hears cases in all areas of the Treaty. The ECJ seeks to 'find' a system for the Treaty, taking into account, where relevant, non-competition rules and objectives too.³⁷⁷ As competition lawyers we must do the same.

³⁷³ Gerber (1994), pages 99 and 100.

³⁷⁴ Bengoetxea, McCormick, and Moral Soriano (2001), at page 47. See also the *Albany Case*, paragraph 60 and van der Esch (1991).

³⁷⁵ van Miert (1993), page 120.

³⁷⁶ Toggenburg (2003), page 10.

³⁷⁷ Judge Edwards, talking about the European Court of Justice's legal reasoning, says that the judge's role "...cannot be confined to that of providing a technocratic literal interpretation of texts produced by others...the judge must proceed from one case to another seeking, as points come up for decision, to make the legal system consistent, coherent, workable and effective." Edwards (1996), pages 66-67.

CONCLUSION OF PART A

Part A approached the question, *should antitrust laws consider public policy objectives outside of welfare?*, from two perspectives. Chapter One conducted a theoretical analysis in a legal vacuum, explaining when it is rational to consider non-economic objectives within competition policy. Chapter Two changed the emphasis, examining the question within the context of a specific legal system, article 81 of the Treaty.

Chapter One debated two questions: *why* might competition policy incorporate non-welfare objectives? and *when* should competition policy consider non-welfare objectives? Only by answering these questions can one understand how competition policy can and should interact with other areas of law, in the abstract.

The first question, *why* might competition policy incorporate non-welfare objectives?, was relatively easy to answer. Competition policy invariably has a welfare objective, normally consumer welfare. This is value-laden, promoting consumer protection, in a wide sense. The pursuit of this policy objective through competition policy can affect other policy objectives. Allowing competition policy to take account of these interactions means that a better balance can be attained with other public policy goals, such as public safety and national security. That does not mean that competition should always be compromised for non-economic policy objectives.

A second question asked, *when* should competition policy consider non-welfare objectives? Ignoring non-economic policy objectives when applying competition law can create significant benefits, in terms of enhanced legal certainty. This encourages firms to invest and innovate. That said, sometimes, the benefits that enhanced legal certainty brings are outweighed by the importance of the policy goals it undermines. Even then, it may still be better to focus on a pure welfare test in competition policy where these non-welfare objectives can be adequately protected through other legislative tools, indeed this is often the case. However, this robust conclusion should be re-assessed where the benefits that enhanced legal certainty brings are outweighed by the importance of the policy goals at stake *and* these interests: (i) cannot be protected through alternative legislation (either in fact or for jurisdictional reasons); or (ii) have not actually been protected by alternative legislative tools.

Chapter Two asked whether Community competition provisions consider public policy objectives outside of welfare. It concluded that both the Treaty's structure and the presence of the policy-linking clauses create the possibility of conflicts in Community law. The Treaty normally resolves these conflicts through compromise, but sometimes it is silent. The Community Courts have had to fill the silence. In the vast majority of cases, including those related to article 81, they have chosen to compromise, i.e. to encourage the balancing of

different policy objectives within specific articles. This is because they view competition policy not as an end in itself, but as an instrument in a wider system for achieving the Treaty's fundamental goals. The Community Courts interpret article 81 broadly and many public interest issues can now be considered within it. This includes those protected by the policy-linking clauses, as well as those promoted in the Preamble, article 2 of the Treaty, etc.

The Commission is creating a lot of ambiguity by implying that public policy concerns are irrelevant in article 81 decision-making. It is not able to make such a policy change as it is bound by the Treaty and the Community Courts' judgments. That said, in practice, the Commission seems to be following the Community Courts' lead in its decisions.

Chapter One and Two's conclusions are somewhat different. Chapter One argues that the consideration of non-welfare objectives is warranted, but only under strict conditions. Chapter Two reveals a Treaty and Community institutions that more readily embrace the balancing of these objectives within competition law.³⁷⁸ This raises two further questions: *why* does the practice revealed in Chapter Two differ from Chapter One's theoretical matrix? and *how* can these two positions be reconciled?

There are many reasons why Community competition law does not correspond to Chapter One's theoretical framework. Briefly put, the Treaty was designed, and has since been amended, by politicians. They must 'sell' this 'product' to their heterogeneous constituencies.

"The policy-makers try to maximise their election or re-election probabilities. This fundamental objective implies satisfying powerful interest groups, but also keeping an eye on the general interest, or at least the perception that the majority of voters could have of the major decisions."³⁷⁹

The short-term benefits of this approach are more apparent than the long-term costs. Furthermore, legislators often balance competing objectives when legislating. They may not recognise the potential costs involved. There may also be a touch of political expediency in allowing politicians to promote many policy goals while sheltering under the umbrella of 'promoting competition'. Finally, for political reasons it would have been very difficult for the administrators of Community competition policy, the Community Courts and the Commission, to ignore other policies.³⁸⁰

The 'attacks' on the consideration of multiple objectives within competition policy have been largely influenced by economists.³⁸¹ Their arguments are based on fundamental premises, often

³⁷⁸ This is confirmed when the other limits of the balance are discussed in Chapter Four and Part C.

³⁷⁹ Laussel and Montet (1995), page 57.

³⁸⁰ Buigues, Jacquemin and Sapir (1995a), page xii and Laussel and Montet (1995), page 50.

³⁸¹ For example, Gual (1995), page 23, writes that the policy linking clauses, particularly article 159 of economic and social cohesion "...provides a major source of inefficiencies in EC policy-making, to the extent that this equity or

ignoring the context into which these rules must be placed. The Commission and the Community Courts do not have this luxury. They are bound by the system that the politicians built. Perhaps another factor is at play as well? Competition laws (and the consumer welfare imperative) can affect many policy objectives. This affect is reciprocal. It is easy to implement an appreciability doctrine where these affects are small. However, outside of this, balancing disparate policy goals through different pieces of legislation is extremely difficult because it is hard to develop general rules which achieve an optimal balance in all areas. The economists' recommendations often ignore these difficulties. Although legal certainty is undermined, where important objectives are at stake it is often easier to find the optimal balance on a case-by-case basis.³⁸² Easier, at least for the politicians. But, as we have said, the politicians design the system.

Given this divergence, what solutions can be found? There is some flexibility within the Community competition law system and Part C of this thesis suggests ways of incorporating Chapter One's policy recommendations within the Community legal order, to the extent that this is possible. Unless the Treaty is to be fundamentally re-written little more can be done. Before turning to Part C however, we need a more thorough understanding of how and where these policy objectives are considered in article 81. This is Part B's role.

re-distribution mandate constrains the formulation of policies in all domains and gives rise to the inefficient use of policy instruments." See also page 39 of the same chapter.

³⁸² This is aided by the use of impact assessments which seek to ensure that the effects on different policy areas are correctly assessed, see Chapter Eight.

**PART B: HOW AND WHERE *IS* PUBLIC POLICY BALANCING
PERFORMED IN ARTICLE 81?**

INTRODUCTION TO PART B

This thesis has three objectives. Part A showed that, while not perfectly in line with economic theory, the Treaty, as interpreted by the Community Courts, demands that non-economic objectives should be considered within article 81. We saw that this position is supported by both the Council and the European Parliament. We also saw that, although its recent policy statements imply otherwise, the Commission regularly considers public policy goals within article 81.

The Commission's recent policy statements side-lining non-economic objectives, combined with an underlying trend (in jurisdictions without the Community legal framework) towards a pure economic welfare model has sown a lot of confusion within the Community. Given that the consideration of non-economic objectives has been such a significant phenomenon, as well as the potential for this to grow in future, this thesis' second objective is to analyse how and where these non-economic objectives are considered by the Commission within article 81, as well as where the balance lies between different Treaty objectives. This is Part B's purpose.

Non-economic objectives are considered within article 81 via two mechanisms. We call the first mere-balancing. Chapters Three and Four deal with mere-balancing in relation to article 81(1) and (3), respectively.³⁸³ mere-balancing operates *outside* of the market mechanism. The Commission assesses the effect on competition and then balances it against other relevant objectives. Chapter Five looks at a different mechanism, market-balancing. Under market-balancing the Commission weighs some objectives *within* the economic efficiency test itself.

Why should we consider how and where non-economic Treaty objectives are considered within article 81? There are four main reasons. First, Part B provides details of how and where balancing takes place in order to establish, irrefutably, that, contrary to its policy statements, the Commission considers non-economic objectives within article 81. The details provided in Part B reinforce the arguments provided in this regard in Chapter Two.

Secondly, ex-Commissioner Monti regularly emphasised the need for greater transparency in Community competition law.³⁸⁴ Transparency is related to legal certainty. Legal certainty is important for undertakings, Chapter One. Decision-makers can increase compromise's transparency (and thus certainty) by explaining where the balancing takes place, how it is conducted and what the limits of the balance are. It is also important to provide clear guidelines

³⁸³ Chapters Three and Four consider a selection of Treaty objectives. Each discussion starts with a brief analysis of the specific objectives under consideration. A brief discussion is sufficient because this thesis analyses the balancing mechanism in general, rather than specific policies in particular. For those who require more detailed explanations of such policies, see, Moussis (2003) and Collège d'Europe (1998), as well as the references that can be found there and in the relevant chapters below.

³⁸⁴ See, for example, Commission, *RCP 2000*, pages 8 and 9.

for the Member States' courts and competition authorities which now apply article 81 in its entirety. The sheer quantity of decisions where public policy has been considered further underlines the need for research in this area.

The idea that some balancing takes place within article 81(3) of the Treaty is reasonably uncontroversial and is apparently supported by that article's structure, Chapter Four. However, there is relatively little discussion about balancing within article 81(1). This is important because of the differing burden of proof in relation to article 81(1) and (3) of the Treaty.³⁸⁵ This issue also affects whether article 81 can be applied at all. As a result, it is helpful to shed more light on how article 81(1) is applied, see Chapter Three. There is also little or no discussion about market-balancing as a concept in the legal literature. While economists take such trade-offs for granted, lawyers generally proceed on the assumption that welfare analysis is a value neutral phenomenon. That this is not the case is important in and of itself, see Chapter One. Furthermore, such knowledge potentially provides lawyers with an additional mechanism for achieving the optimal balance. Chapter Five asks whether it is an appropriate mechanism.

Finally, the third objective of this thesis is to suggest how and where the balancing process *should* best be conducted, Part C. We decided to split this issue out from the discussion of how article 81 is currently interpreted, in order to increase the transparency of our critique. As a result, Part B's discussion of how and where the balance is conducted is relatively descriptive. That said, it highlights many issues which must be considered in Part C and provides analysis to support the later debate.

³⁸⁵ See Regulation 1/2003, article 2.

CHAPTER THREE: HOW IS THE BALANCE IMPLEMENTED? - MERE-BALANCING IN ARTICLE 81(1) OF THE TREATY

1. Introduction
2. Compromise within Article 81(1) of the Treaty
 - 2.1. Market integration
 - 2.1.1. *Market integration*
 - 2.1.2. *Economic efficiency*
 - 2.1.3. *The balance?*
 - 2.1.4. *Conclusion*
 - 2.2. Environmental protection
 - 2.2.1. *Environmental protection*
 - 2.2.2. *The balance?*
 - 2.2.3. *Conclusion*
 - 2.3. Conclusion
3. Two Related Questions
 - 3.1. Are there limits to article 81(1)'s balance?
 - 3.2. Why does balancing take place within article 81(1) as well as article 81(3)?
 - 3.3. Conclusion
4. Conclusion

1. INTRODUCTION

The structure of article 81 of the Treaty implies that any balancing should be done in article 81(3), see Chapter Four. This repartition 'of competences' is affirmed by academics. Faull and Nikpay note that non-welfare rules are considered under article 81, however:

"...they will be relevant only to policy considerations, arising under article 81(3), as they do not have any impact on the notion of restriction of competition for the purposes of article 81(1)."³⁸⁶

Nevertheless, the Community Courts and the Commission sometimes consider non-welfare objectives within article 81(1) of the Treaty.³⁸⁷ Chapter Three discusses this as well as two related issues:

- what limits are there on article 81(1)'s balance, for example, can competition be eliminated, as forbidden under article 81(3) of the Treaty? and;
- why does balancing take place within article 81(1) when article 81(3) seems more appropriate?

³⁸⁶ Faull and Nikpay (1999), paragraph 2.14. See also, Whish (2003), page 123; Vedder (2003), pages 157 and 158; Shelkopyas (2003), page 227; Deards (2002), page 622; Monti (2002), pages 1059-1062 and 1069 and following; Hawk (2001), page 304; Deckert (2000), pages 178 and 179, for a brief summary of views; Forrester (1998), page 380; Siragusa (1997), page 285 and Vogelaar (1994), pages 531, 535, 543 and 545.

³⁸⁷ Schröter (1987), pages 659-661.

Chapter Three cannot provide definitive answers to these questions, due to the lack of relevant decisions, and the lack of clarity within those that there are. That said, it hopes to provide a helpful first step on the road to transparency. It does this by examining two non-economic objectives and investigates how they are balanced within article 81(1), Section 2. The focus is on market integration, Section 2.1.; and, environmental protection, Section 2.2.³⁸⁸ Section 3 discusses the two related questions highlighted above. Section 3.1. asks whether article 81(1)'s balance carries limits; and, Section 3.2. asks why balancing takes place within article 81(1) as well as article 81(3).

2. COMPROMISE WITHIN ARTICLE 81(1) OF THE TREATY

2.1 Market integration

First, Section 2.1. asks what market integration means. Then, it discusses why it is pursued. Next, economic efficiency gets the same treatment. Why is this important? Understanding why these objectives are pursued helps us to assess when conflicts exist and to better deal with them when they do. Also, where one objective achieves many ends, it is more important, which should increase its weight in the balance. Finally, the balance between market integration and economic efficiency in article 81(1) of the Treaty is analysed. Where agreements restrict market integration, as defined by the Community Courts, then they risk breaching article 81(1) of the Treaty. Can an agreement, which restricts market integration, be 'saved' within article 81(1) of the Treaty if it enhances economic efficiency?³⁸⁹

2.1.1 Market Integration

The Treaty's Preamble resolves to eliminate the barriers dividing Europe. The Commission has called market integration the second objective of Community competition policy, see Chapter One. The Community Courts also consider market integration important. In the *Consten and Grundig Case*, a German television manufacturer, Grundig, promised Consten that neither it, nor any of its other distributors, would sell either directly or indirectly in France. Grundig made this promise to encourage Consten to become its French distributor. The ECJ held that such a clause breached article 81:

³⁸⁸ The Community Courts and the Commission have also balanced other objectives within article 81(1) of the Treaty. Market integration and environmental protection were selected for discussion as they illustrate a number of important points of interest. Furthermore, the caselaw is more developed for them than for other factors. Other objectives considered within article 81(1) include: (a) the proper practice of the legal profession, the *Wouters Case*, see Chapter Two; (b) the dignity and rules of conduct of representatives before the European Patent Office, Case T-144/99, *Institute of Professional Representatives before the EPO v. Commission* [2001]; and, (c) the integrity of UEFA club competitions, Commission Communication, *UEFA rule on 'integrity'*, paragraph 10.

³⁸⁹ I assume that economic efficiency is considered in article 81(1). This is unclear, see Chapter Six. If the *Métropole télévision Case* and Case T-65/98, *Van den Bergh Foods Ltd. v. Commission* [2003] are followed then my arguments about the overlap between economic efficiency and market integration should be ignored. Otherwise, the discussion remains essentially the same.

"...an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85(1) [now 81(1)] is designed to pursue this aim..."³⁹⁰

The market integration objective is regularly used in article 81(3) analysis. It is also the only Treaty objective, outside of economic freedom and economic efficiency, that many academics cite as a constituent part of the article 81(1) test, see below.

While it is clear that market integration is a valid objective of article 81,³⁹¹ it is important to ask why this objective is being pursued. This helps us assess its weight in the balance. It also makes any conflicts more apparent.

Preventing territorial protection is considered important in order to achieve the single market:

"Such prohibitions [those on exports and imports] jeopardise the freedom of intra-Community trade, which is a fundamental principle of the Treaty, and they prevent the attainment of one of its objectives, namely the creation of a single market."³⁹²

But why is achieving the single market considered important? The single market is unlikely to be an aim in and of itself.³⁹³ Some say it promotes economic freedom.³⁹⁴ Others argue that economic efficiency justifies the market integration goal, see Chapter One. Recently, market integration has been touted as a way of achieving consumer protection goals. Commission, *RCP 1991*, page 15, argues that barriers to economic integration in the Community are particularly bad because they:

"...shield an entire Community industry from exposure to effective competition and because they make the European consumer pay the price for cosy industry arrangements."

These views are increasingly common in Commission decisions and notices.³⁹⁵ Indeed, the Commission has even started to talk of a consumer *right* to buy anywhere in Europe.³⁹⁶

³⁹⁰ Page 340. The Community Courts have reaffirmed this on numerous occasions. See, for example, Case 8/72 *Vereeniging van Cementhandelaren v. Commission* [1972], paragraph 29 and Case T-9/92 *Automobiles Peugeot and Peugeot v. Commission* [1993], paragraph 42.

³⁹¹ See, for example, Wesseling (2000), Chapter Four; B&C (2001), paragraphs 1-077 and 2-067 and Ehlermann (1998).

³⁹² Joined Cases 100-103/80 *SA Musique Diffusion Française v. Commission* [1983], paragraph 107. See also, Commission, *RCP 1994*, paragraph 10 and *Rapport des Chefs de Délégation aux Ministre des Affaires étrangères*, page 16.

³⁹³ Collège d'Europe (1998), page 91.

³⁹⁴ Monti (2002), page 1063.

³⁹⁵ See also, Commission, *RCP 1992*, page 50; Commission, *Vertical Guidelines*, paragraph 103(iv) and Commission decision, *Distribution System of Ford Werke AG*, paragraph 43

"While most distribution agreements are pro-competitive and facilitate market entry, some lead to the setting-up of watertight national distribution networks which partition markets, in particular where distributors are prevented from supplying customers based outside the contract territory. In this way, national markets are artificially isolated from one another, limiting competition and price convergence. *Such agreements impinge upon the right of European consumers to purchase goods in the Member State of their choice* and result in their being denied the benefits of the internal market, particularly where there are price differences between Member States. [my emphasis]"

The Institutions are rarely explicit and are inconsistent in their approach. Market integration is variously justified as it increases economic freedom, economic efficiency or consumer protection. To the extent that market integration helps achieve all three, it should be given a lot of weight, as these are important Community objectives.

Whatever the underlying rationale for pursuing it, from the very beginning market integration has been applied formalistically, without assessing whether it actually contributes to these underlying goals.³⁹⁷ For example, sometimes obstacles to the free movement of goods actually contribute towards the integration of national markets.³⁹⁸ They would still be found to undermine the market integration goal. In the *Consten and Grundig* case, discussed above, Advocate-General Roemer said:³⁹⁹

"The possibility cannot be excluded that such an examination of the market might have led to a finding that in the *Consten-Grundig* case the *suppression* of the sole distributorship might involve a noticeable reduction in the supply of Grundig products on the French market and consequently an unfavourable influence on the conditions of competition existing there."

And he continued that prohibiting absolute territorial protection might stand in the way of the integration of the various national markets:

"...because it may lead to the possible consequence that foreign markets are worked over a smaller field and with less intensity (for example, in respect of after-sales service) than the national market which is more readily available to the producer."⁴⁰⁰

³⁹⁶ Commission, *RCP 1999*, paragraph 53. See also, Verouden (2003), page 530; Commission, *RCP 2000*, paragraph 93 and Commission decisions, *VW*, paragraph 189, and *Opel*, paragraph 160.

³⁹⁷ See, Wesseling (2000), pages 87, 97 and 98; Korah (1997), page 5; Pera and Todino (1996), page 137 and Korah (1986), pages 93 and 94.

³⁹⁸ See, for example, Commission decision, *The Distillers Company Limited*, where "...the condemnation be the Commission of the dual price system and of the export ban designed by the company to hinder parallel imports led to a result opposite to that pursued by the Commission: the splitting of the brands under which Distillers sold the product in the UK and the Continent.", Heimler and Fattori (1998), page 597. See also, Motta (2004), page 23 and Chapter 7; Van den Bergh (2002), pages 36, 37, 40; Korah (2000), pages 13 and 14; Wesseling (2000), pages 78, 81 and 98; Neven, Papandropoulos and Seabright (1998), page 42 and van den Bergh (1995), pages 76-81 and 41.

³⁹⁹ The *Consten and Grundig* Case, pages 359 and 360-361, respectively.

⁴⁰⁰ See also, Neven (1998), page 117 and Heimler (1998), page 335.

As we saw above, in its judgment the ECJ adopted more of a *per se* approach in relation to absolute territorial protection. The ECJ seemed to want to stop barriers to trade above all. It did not discuss Advocate-General Roemer's point that this might reduce market integration, nor did it accept that reductions in economic efficiency were relevant, see Chapter One. It is hard to explain why the ECJ wanted to stop these barriers *per se*.⁴⁰¹ Nor, can this formulism be more readily understood in light of the other objectives, such as consumer protection, that market integration is said to promote. As we have seen, imposing such an obligation might undermine the supply of some goods into certain territories, what would become of the consumer protection point then? Surely the Commission would not insist upon supplies everywhere?⁴⁰²

In conclusion, the Commission and the Community Courts are inconsistent in their justifications for the market integration objective. Furthermore, they tend to apply it in a formulistic manner, which can undermine the very objectives that they seek to promote. Nor can we just ignore this lack of clarity as, despite the arguments of some,⁴⁰³ the market objective is unlikely to disappear in the near future. The Commission and the Community Courts still turn to market integration in order to try to achieve/ maintain the single market.⁴⁰⁴ Formulism may even be more efficient where there is no competition culture.⁴⁰⁵ This is important, for as Whish emphasises:

"The accession of ten new Member States on 1 May 2004 means that the single market imperative will continue to have an influential role in competition law enforcement for many years to come."⁴⁰⁶

It is important to understand why market integration is being pursued. If, as seems likely, this is not just for efficiency reasons then the Commission must consider any trade-offs between this and economic efficiency and justify them in its decisions.⁴⁰⁷ If the market integration imperative were solely about economic efficiency, then, these two objectives should not conflict at all.

⁴⁰¹ Wesseling (2000), Chapter Four. Also see van der Esch (1980), page 75.

⁴⁰² Although see, Waelbroeck (1987).

⁴⁰³ See, Shelkopyas (2003), page 228; Wesseling (1998), page 485; Amato (1997), page 52; Massey (1996), pages 98-100; Pera and Todino (1996), page 129; Forrester (1994), pages 460 and 461 and Verstryng (1984), page 677.

⁴⁰⁴ See article 81(1)(a)-(e) of the Treaty, Commission, *Vertical Guidelines*, paragraph 7 "Market integration is an additional goal of EC competition policy."

⁴⁰⁵ Although, Forrester argues that this culture should be instilled where the applicant countries implemented the *acquis communautaire* before arrival, Forrester (1994), page 461.

⁴⁰⁶ Whish (2003) page 21. See also, Jones (2004), pages 18 and 49; Monti (2002), page 1092; Van den Bergh (2002), page 36; Gerber (2001), page 122 and Ehlermann (1998), page x.

⁴⁰⁷ Van den Bergh (2002), pages 37 and 41 and Neven, Papandropoulos and Seabright (1998), page 20.

2.1.2 Economic Efficiency

Chapter One discussed economic efficiency at length. It is an important objective in Community competition law. Indeed, the Commission has called it the primary objective of article 81, see Chapter One.

The CFI has said that economic efficiency concerns, while they can properly be raised in the article 81(3) analysis, should not be considered in discussions related to article 81(1) of the Treaty.⁴⁰⁸ It added that economic freedom, rather than economic efficiency, is the correct basis for intervention under article 81(1) of the Treaty.

However, there are reasons to believe that article 81(1) of the Treaty is not only triggered by restrictions on economic freedom.⁴⁰⁹ Why? First, the Commission has said that maximum resale price maintenance will not necessarily breach article 81(1) of the Treaty.⁴¹⁰ Such clauses restrict economic freedom just as much as minimum resale price maintenance and so, at least sometimes, it seems as though other factors are relevant under article 81(1) of the Treaty. Another example is provided by the Community Courts' attitude, in cases such as *Fiatagri UK Ltd. and New Holland Ford Ltd. v. Commission*,⁴¹¹ to information agreements. Information agreements sometimes restrict competition, even where they do not contain any restrictions on the parties themselves,⁴¹² or others.⁴¹³ The courts' attitude can often be justified in terms of economic efficiency,⁴¹⁴ but is harder to understand in terms of economic freedom.⁴¹⁵

Some suggest that a balancing approach is employed in article 81(1) of the Treaty to assess whether the agreement is pro or anti-competitive overall. This is otherwise known as a rule of reason or welfare analysis. The Commission admits to having used the rule of reason. Analysis of Commission decisions and notices supports this. See Chapter Six, for a discussion of these issues.

⁴⁰⁸ Let's assume this is what these cases say, although it is unclear, see Chapter Six. The *Métropole Télévision Case*, paragraphs 74-78. See also, Case T-65/98, *Van den Bergh Foods Ltd. v. Commission* [2003], paragraph 107.

⁴⁰⁹ Whish (2003), page 117.

⁴¹⁰ Commission, *Vertical Guidelines*, paragraph 47 and Commission decision, *Nathan-Bricolux*, paragraph 87. Whish (2003), page 632, says that the Community Courts have never ruled on this issue.

⁴¹¹ Case T-34/92, *Fiatagri UK Ltd. and New Holland Ford Ltd. v. Commission* [1994], paragraphs 86-94 and Commission decision, *UK Agricultural Tractor Registration Exchange*, paragraphs 34-56. See also, Commission decision, *IFTRA Free Trade Rules on Glass*, paragraphs 43-45 and Joined Cases C-89/85 etc. *A Åhlström Oy v. Commission* [1993].

⁴¹² See, Schaub (1998), page 124.

⁴¹³ See, Neven, Papandropoulos and Seabright (1998), pages 99 and 100.

⁴¹⁴ Kühn and Vives (1995).

⁴¹⁵ Faull and Nikpay (1999), paragraphs 2.79-2.81. Marengo (1999), pages 1242 and 1243, argues that information agreements do effect the parties as they make price reductions by the parties less attractive (to them) and therefore, less likely. Such a test would make the dividing line between acceptable and unacceptable agreements hard to spot.

In conclusion, as we saw in Chapter One, economic efficiency is a very important objective in its own right. Furthermore, through economic efficiency the Commission hopes to create a system in which, over the long term, its industrial, environmental and regional policies will be achieved and, ultimately, that the well-being of the consumer in general will be ensured. There is no doubt about its importance in article 81 as a whole.

That said, there is some doubt about economic efficiency's place within article 81(1) of the Treaty. The Commission now implies that the full efficiency analysis should take place in article 81(3).⁴¹⁶ However, even after *Métropole télévision*, practitioners ignore economic freedom and focus on economic efficiency within article 81(1) of the Treaty, justifying this with a reference to the economic context of the matter.⁴¹⁷ The Commission has not been very rigorous in separating out arguments based on economic freedom and those based on economic efficiency. Even before *Métropole télévision*, it had, on occasion, dealt with both economic efficiency and freedom points in the same decision.⁴¹⁸ Economic efficiency will probably continue to be considered within article 81(1), even if by a different name.

2.1.3 The Balance?

The attitude of the Community Courts and the Commission is that any attempt to impose absolute territorial protection through an agreement, that appreciably⁴¹⁹ affects trade between Member States, will restrict competition for the purposes of article 81(1) of the Treaty, however this is achieved.⁴²⁰

For example, in *Tretorn and others*⁴²¹ agreements between Tretorn, an undertaking that manufactured tennis balls, and some of its exclusive distributors were considered. The Commission found that since 1987 Tretorn had set up, in concert with its exclusive distributors, both inside and outside the Community, an export ban in its exclusive distribution system,

⁴¹⁶ Commission, *Article 81(3) Guidelines*, paragraph 11.

⁴¹⁷ Discussion with James Venit, 28 May 2003.

⁴¹⁸ See, for example, Commission decisions, *International Private Satellite Partners*, paragraphs 55-61 and *FEG and TU*, paragraphs 105-107, 117 and 119.

⁴¹⁹ See, Case 5/69 *Franz Völk v. Établissements J. Vervaecke* [1969].

⁴²⁰ Some might argue that Case 27/87 *Erauw-Jacquery v. La Hesbignonne Société Coopérative* [1988] and Case 306/96 *Javico International and Javico v. YSL Parfums* [1998] undermine this statement. In *Erauw-Jacquery* the ECJ allowed absolute territorial protection. However, without this the licensor would not have been able to control the quality of his product, something that was essential on the facts. The overlap between competition law and intellectual property rights is a complex one and is not discussed in this paper. The ECJ did not consider the more interesting clause (i) that the French court asked it to analyse, which dealt more directly with territorial protection as discussed in this chapter. *Javico* involved absolute territorial protection from licensees in Russia and the Ukraine. At paragraph 19 the ECJ said that these restrictions "...must be construed not as being intended to exclude parallel imports and marketing of the contractual product within the Community..."

⁴²¹ Commission decision *Tretorn and others* appeal dismissed, Case T-49/95 *Van Megan v. Commission* [1996].

paragraphs 13 and 16-21. The Commission found that this system breached article 81(1) of the Treaty. At paragraph 51 it said:

"The general export ban and the barriers had the direct object and effect of restricting competition...This, in fact, constitutes an obstruction of the achievement of a fundamental objective of the Treaty, the integration of the common market."⁴²²

The Commission did not ask whether economic efficiency was enhanced, nor did it consider whether the distribution system, despite the territorial protection involved, would help integrate markets. It just cited market integration in the usual formulistic manner. Market integration was not expressly balanced against any other objective,⁴²³ the mere presence of barriers was found to restrict competition.

Incorporating absolute territorial protection into agreements has, in effect, become a *per se* violation of article 81(1) of the Treaty.⁴²⁴ Such clauses are considered to have the object of restricting competition. The ECJ has said that:

"...there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."⁴²⁵

This applies even where the methods used to achieve such a territorial restriction are indirect, such as charging different prices according to the territory for which the goods are being delivered⁴²⁶ or a refusal to grant discounts for these goods.⁴²⁷ The balance is tilted in favour of market integration.

In the face of this strong approach, parties very rarely argue that economic efficiency benefits justify absolute territorial protection. One might expect such submissions to become more regular in the future, however. In the same year as it decided *Tretorn and others*, the Commission implied that, where efficiencies would justify it, it might be prepared to allow them to out-weigh market integration.⁴²⁸

⁴²² See also, for example, Case 22/71 *Béguelin Import v. G.L. Import Export* [1971], paragraph 12 and Case T-77/92 *Parker Pen v. Commission* [1994], paragraph 37.

⁴²³ As a consequence, the importance of the market integration imperative was not assessed either, in terms of the objectives that it would achieve weighed against the objectives to be achieved if absolute territorial protection were allowed.

⁴²⁴ Support is given in the *European Night Services Case*, paragraph 136 and Manzini (2002), pages 398 and 399.

⁴²⁵ *Consten and Grundig Case*, page 342 and, for example, the *Verband der Sachversicherer Case*, paragraph 39.

⁴²⁶ See, for example, Commission decision, *The Distillers Company Limited*, section 2; appeal dismissed Case 30/78 *Distillers Company v. Commission* [1980].

⁴²⁷ See, for example, Commission decision, *Sperry New Holland*, paragraph 55.

⁴²⁸ For other grounds of attack see Case T-41/96 *Bayer v. Commission* [2000] and Rey and Venit (2004), pages 154-160.

"As far as vertical agreements...are concerned, the Commission's position has always been to prohibit and take strict measures against practices that artificially partition markets. Concern to achieve a single market has predominated over all other aspects, including the fact that vertical agreements may in themselves have certain competitive advantages, such as allowing producers to operate more efficiently on new markets. The further stage reached last year in achieving the internal market allows a more flexible approach to be taken to this type of restriction."⁴²⁹

As the Commission acknowledged in its *Vertical Guidelines*, paragraph 114, the main effect on welfare of vertical territorial protection is a reduction in intra-brand competition. This is normally⁴³⁰ only problematic, from an efficiency perspective, where there is insufficient inter-brand competition, paragraph 119(1). Rather than always saying that absolute territorial protection breaches article 81(1) of the Treaty, a proper balancing exercise would examine agreements in this light.

In *Glaxo Wellcome* the parties argued that their attempts to block parallel imports into the UK were justified because, amongst other things, they produced efficiency gains. The Commission only dealt with the issues under article 81(3) of the Treaty, even though the point was also raised under article 81(1). On the facts, the Commission found that the agreement did not enhance economic efficiency so no balancing exercise was undertaken.⁴³¹ Nevertheless, *Glaxo Wellcome* may signify a shift. We have seen above that the ECJ held that the practical effects of hardcore restraints need not be taken into account. In *Glaxo Wellcome* the Commission seemed prepared to discuss these factors;⁴³² although the implication is that the Commission will be hard to convince.

While I have not seen a case where absolute territorial protection was accepted under article 81(1) of the Treaty⁴³³ it might now be possible to put even this into the balance and parties may be increasingly willing to make such arguments.⁴³⁴

⁴²⁹ Commission, *RCP 1994*, paragraph 10. The citation is very general. Nothing indicates that it would not also apply to absolute territorial protection, but the Commission does not specifically refer to this either.

⁴³⁰ A lack of intra-brand competition can also lead to welfare loss, see Monti (2002), page 1066 and Chapter One.

⁴³¹ Commission decision, *Glaxo Wellcome and others*, now under appeal Case T-168/01. On the general merits of such economic arguments by pharmaceutical companies see, Rey and Venit (2004), pages 160-177. After its judgment in Case T-41/96 *Bayer v. Commission* [2000] the CFI may now demand a proper economic analysis as to whether the territorial protection is welfare reducing, see Rey and Venit (2004), page 175.

⁴³² Although not in article 81(1) as yet. In this regard see Commission, *Article 81(3) Guidelines*, paragraphs 21-23.

⁴³³ A possible exception to this is the *Coditel* Case, paragraph 16, where the ECJ (in an unclear section of the judgment) in effect permitted absolute territorial protection in favour of licensees to exhibit a cinema film. The ECJ's reasoning seems to be based on economic efficiency, cultural and industrial policy grounds. At paragraphs 17-20 the ECJ held that an exclusive licence might not infringe article 81(1) of the Treaty where there was evidence of unreasonable exploitation. However, it has been argued that this case is limited to the special circumstances of film exhibitions, B&C (2001), paragraph 2-088, and may even turn on its own facts. Nevertheless, Anderman (1998), page 70, seems to read this case as establishing a general principal.

Absolute territorial protection is an extreme form of territorial protection. There are more limited forms. Two justifications for allowing these more limited forms of market integration will now be considered.

In *Société Technique Minière*, which was decided two weeks before the *Consten and Grundig* case, the ECJ considered an agreement where a French company, STM, had been given an exclusive right to sell certain machines in France that had been manufactured by a German firm, MU. STM had agreed not to sell competing machines and in return had been given an exclusive territory. Parallel imports were not restricted, nor were passive sales.⁴³⁵ The ECJ said, page 250:

"The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking."

The ECJ went on to say that agreements offering an exclusive right of sale did not, by their very nature, restrict competition within article 81(1) of the Treaty, page 251. So outside of absolute territorial protection the agreement's effects should be taken into account as well.

In *Société Technique Minière* the ECJ spent some time discussing what features might be considered important within the actual context, page 250. These were elements such as the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the parties on the market for the products concerned, the isolated nature of the disputed agreement and the severity of the clauses intended to protect the exclusive dealership.⁴³⁶ The reason for investigating all these factors in this case was to assess whether the agreement seems really necessary for the penetration of a new area.⁴³⁷ Despite this relaxation in the test, these, more limited, types of territorial protection have only been allowed under article 81(1) of the Treaty on a limited number of occasions.

There is a logic to this relaxation in terms of the balance. As such clauses undermine market integration less than those seeking absolute territorial protection (qualitatively), it is easier to justify them where they promote economic efficiency.

⁴³⁴ Commission, *Article 81(3) Guidelines*, paragraph 18(2) does not necessarily rule this out. Commission, *Vertical Guidelines*, paragraph 119(10), may even encourage it under certain limited conditions. Thanks to Giorgio Monti for this comment.

⁴³⁵ The judgment is not clear on this point but this is the position taken by many academics, see, for example, B&C (2001), paragraph 2-065 and it is followed here.

⁴³⁶ Whish (2003), page 604 suggests that further help may be obtained from the Commission, *Vertical Guidelines*, paragraphs 163-170.

⁴³⁷ The ECJ in both the *Consten and Grundig* Case, pages 342 and 343 and the *Pronuptia* Case, paragraph 24, refers to the fact that there the product/ trade mark is already widely known when it finds that article 81(1) of the Treaty has been breached and thus there was no penetration of a new area with a new product.

In the second example of a justification for restricting market integration, the *Nungesser Case*, the ECJ was more generous. The case concerned an agreement between the French national agricultural research institute (INRA) and Mr Eisele, trading as Nungesser. INRA exclusively assigned, to Mr Eisele, the right to produce and sell, in Germany, certain maize seeds it had developed. INRA undertook to prevent its seeds being exported to Germany, except via Mr Eisele.

As in *Consten and Grundig*, the ECJ held that absolute territorial protection was contrary to article 81(1) of the Treaty, paragraph 61. However, in a distinction which is more based on policy than logic,⁴³⁸ the ECJ added, in paragraphs 57 and 58, that:

"...in the case of a licence of breeders' rights over hybrid maize seeds newly developed in one Member State, an undertaking established in another Member State which was not certain that it would not encounter competition from other licensees for the territory granted to it, or from the owner of the right himself, might be deterred from accepting the risk of cultivating and marketing that product; such a result would be damaging to the dissemination of a new technology and would prejudice competition in the Community between the new product and similar existing products.

Having regard to the specific nature of the products in question, the Court concludes that, in a case such as the present, the grant of an open exclusive licence, that is to say a licence which does not affect the position of third parties such as parallel importers and licensees for other territories, is not in itself incompatible with article 85(1) [now article 81(1)] of the Treaty."

This judgment implies that economic efficiency arguments, here raised in the context of increasing competition by encouraging a new entrant, *combined with* the benefits of innovation, may be enough to outweigh the market integration objective where only open exclusive licences are used, i.e. licences that allow for parallel trade between territories.⁴³⁹ The issue of passive sales was not explicitly raised in the case and so it is not clear where the ECJ stood on them.

The balance in favour of introducing new products, as opposed to introducing old products onto new geographical markets, is tilted slightly further in favour of economic efficiency. In *Société Technique Minière*, the ECJ said that the restriction on active sales had to be really necessary for the penetration of the new area. In *Nungesser*, the ECJ says that, for new products, restrictions on active sales can be justified where the licensee was not certain that it would not encounter competition from other licensees or the licensor, and because of this might be deterred from accepting the risk of cultivating and marketing the product. This logic is in line

⁴³⁸ B&C (2001), paragraph 2-089.

⁴³⁹ In the *Pronuptia* Case, paragraph 24, the ECJ found that a certain amount of territorial protection which was not, on its face, absolute, breached article 81(1) of the Treaty. This may have been because the products in question were of a well known brand. It has also been suggested that the ECJ felt that the exclusivity enjoyed by the franchisee, coupled with the location clause preventing a franchisee from opening a second shop might give rise to *de facto* absolute territorial protection, B&C (2001), paragraph 2-093.

with the Commission, *Vertical Guidelines*, paragraph 174, where it says that the case in favour of exclusive distribution is strongest for:

"...new products, for complex products, for products whose qualities are difficult to judge before consumption...or of which the qualities are difficult to judge even after consumption..."⁴⁴⁰

Perhaps the market integration/ economic efficiency balance will allow open exclusive licenses, for these sorts of products too, based on this more limited justification?

Having said that, was *Nungesser* stating the case too strongly against market integration? It is often argued to turn on the specific facts of plant breeders' rights. Korah points out that some 16 years after *Nungesser* the Commission had never applied this precedent in any of its decisions.⁴⁴¹ Of late the Commission has attempted to clarify the position here too:

"...vertical restraints linked to opening up new product or geographic markets in general do not restrict competition. This rule holds, irrespective of the market share of the company, for two years after the first putting on the market of the product. It applies to all non-hardcore vertical restraints and, in the case of a new geographic market, to restrictions on active and passive sales imposed on the direct buyers of the supplier located in other markets to intermediaries in the new market. In the case of genuine testing of a new product in a limited territory or with a limited customer group, the distributors appointed to sell the new product on the test market can be restricted in their active selling outside the test market for a maximum period of one year without being caught by article 81(1)."⁴⁴²

This citation appears to give more protection to restrictions on market integration for entering new geographic markets with old products, than for entering new markets with new products. Did the Commission favour those entering new geographic markets because of the market integration aspect? Such a stance does not seem to be in line with the caselaw discussed above, nor is it necessarily in line with economic theory.

⁴⁴⁰ See also, the *Old Technology Transfer Block Exemption*, recital 10. This "...rejects the Chicago school's overly liberal approach to vertical restraints by reflecting Comanor's suggestion that vertical restraints are likely to be beneficial in the case of new products or new entrants, but less so in the case of well-known products or strong brands.", Monti (2002), page 1064. Commission, *Article 81(3) Guidelines*, paragraph 18(2) may be trying to collapse the distinction.

⁴⁴¹ Korah, V., in Ehlermann (1998), page 528. Although there is sometimes some discussion of the principle, see, for example, Commission decision, *Velcro/ Aplix*, pages 27-31.

⁴⁴² Commission, *Vertical Guidelines*, paragraph 119. This is generous language. However, while it is clear that active and passive sales can be prevented, independent parallel importers can never be restrained, therefore, this position is not contrary to the *Consten and Grundig* Case, pages 342 and 343, such that Consten could benefit from absolute territorial protection. For the opposite view see, Monti (2002), page 1068. Bishop and Ridyard (2002), pages 35 and 37 and Peeperkorn (2002), pages 38 and 39, provide a general critique of balancing these objectives under the guidelines.

2.1.4 Conclusion of Section 2.1.

A balance seems to be taking place. The Community Courts found that the negative effects that absolute territorial protection has on the market integration objective could never be justified on economic efficiency grounds. As the restrictions on market integration lessened, the Community Courts are increasingly prepared to look at economic efficiency benefits and find that these outweigh the restrictions on market integration. Market integration and economic efficiency are important Community objectives, both in their own right and because of the other objectives they can promote.

This does not explain the complete prohibition on absolute territorial protection. Are the Commission, and the Community Courts, saying that because absolute territorial protection is invariably welfare reducing, it is more efficient to prohibit it *per se*? According to this logic some efficient agreements would fall within article 81(1) of the Treaty. These would be few and far between. Therefore, the opportunity costs of this happening would be outweighed by the fact that the Commission would not have to go to the trouble and expense of investigating every case. This could enhance clarity and certainty, saving costs and enhancing welfare over the long-term.⁴⁴³ If this is their point then it is controversial.⁴⁴⁴

The Commission may now be prepared, on occasion, to ignore this *per se* rule. Why? Perhaps its economic analysis has become more sophisticated? Absolute territorial protection can have important welfare effects; in fact, the Commission has said that this should be the case unless there are restrictions on inter-brand competition. This could mean that more efficient agreements fall within article 81(1) than it previously thought. If the utility of the *per se* rule falls in this way, perhaps it is no longer deemed appropriate?

Another reason could be that the balance has actually shifted. How could this happen? Surely the two competing objectives, economic efficiency and market integration have stayed the same? Possibly not. As the single market nears completion, market integration may diminish in importance, see above, although this is unclear since 1 May 2004. Economic efficiency is increasing in importance and is considered a fundamental objective in and of itself. Efficient markets also help achieve many other objectives, such as consumer protection.⁴⁴⁵ As these other objectives increase in importance, so too must a policy that promotes them.

⁴⁴³ See, for example, Easterbrook (1992), pages 129-130 and Easterbrook (1984), page 39.

⁴⁴⁴ "The price to be paid for the stubborn unwillingness to revise these strict prohibitions [market petitioning and minimum resale price maintenance] is high.", Van den Bergh (2002), page 40. For a contrary opinion in relation to territorial protection see, Rey and Venit (2004), page 176.

⁴⁴⁵ Which became an explicit Treaty objective after the *Société Technique Minière* and *Nungesser* Cases.

Another possible reason why this *per se* rule may be crumbling is more fundamental. Perhaps there is no conflict at all? Consider the underlying rationale for the market integration objective. We have seen that market integration, as defined, may have become an end in itself. Alternatively, it may be being used as an aid to consumer protection. If this were true, then pursuing market integration, essentially removing barriers to inter-State trade, could still conflict with economic efficiency. However, market integration is often described as a means of enhancing economic efficiency. To the extent that this is a shift in the reasons for pursuing it (or that the reasons become more widely accepted) there should be a corresponding shift in the balance. If market integration is only there to support economic efficiency then there will no longer be a conflict⁴⁴⁶ and there is no need to balance at all. Why refuse absolute territorial protection unless it is welfare reducing?⁴⁴⁷

The logic of the absolute territorial protection rule is hard to understand. Either it is a *per se* rule, or it is not. This distinction is important to undertakings. If it is a *per se* rule, there may be little point in them challenging it (except politically). If not, a challenge might make sense. The Commission and the Community Courts need to inject more clarity into the area. Simple guidelines that achieve economic efficiency in the majority of cases can be beneficial, reducing the need for expensive economic analysis. Using them could be a rational policy choice. But if this is the reason for the differences in approach noted above then these guidelines should be based on solid economics and this basis should be clearly explained to undertakings. Otherwise, in ambiguity's shadow, undertakings will continue to try to justify territorial protection on economic grounds. This, in turn, raises costs and is inefficient.

The Commission's latest statements imply that there may (no longer) be a *per se* rule. If this is true then it should clearly explain why market integration is being pursued. We saw above that there are many reasons why it could be justified. The main justification for pursuing market integration seems to be because it is welfare enhancing. If so, these two objectives do not conflict and, so, they should not be balanced. What about consumer protection? New rights,⁴⁴⁸ such as that of consumers to buy goods anywhere in the Community, should be based on solid foundations. It may benefit more people, especially the least well off, to have more choice on their doorstep, rather than the ability to go anywhere in the Community to buy the goods they desire. This argues in terms of allowing absolute territorial protection, as long as there is

⁴⁴⁶ van den Bergh (1995), page 77.

⁴⁴⁷ There could still be a place for *per se* rules. However, in light of the developments in the Commission's economic thinking, see above, the justifications for a *per se* rule may no longer be made out.

⁴⁴⁸ To be fair to the Commission, the ECJ has spoken in similar terms. See the *Suiker Unie* Case, paragraph 27, where it held that practical co-operation amounts to a concerted practice within article 81 "...particularly if it enables the persons concerned to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers."

sufficient inter-brand competition. To the extent that this is not the case, distorting competition is probably an inefficient way of achieving this end, see Chapter One. Even if the market integration objective is about objectives outside of economic efficiency there may still be no need for balancing. Consumer protection, for example, would normally be better advanced by following economic efficiency. We have seen that both the CES and the Commission argue that economic efficiency also leads to consumer protection and so even this new basis for market integration may not conflict with economic efficiency.

Even if conflict still exists, the pendulum may shift towards economic efficiency for the reasons set out above. How will the caselaw develop in this area? Will the Commission be so receptive to allowing absolute territorial protection in product areas where it feels that the single market has yet to be achieved, especially since the expansion of the European Union?

2.2 Environmental protection

Section 2.2. examines how environmental considerations may have influenced some of the Commission's article 81(1) decisions. Before doing that we discuss the environmental protection objective and what it promotes. Economic efficiency has already been discussed, see above.

2.2.1 Environmental Protection⁴⁴⁹

Community environmental policy shall contribute to pursuit of the following objectives, article 174(1) of the Treaty:

"...preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems."

Environmental protection is an extremely important principle of Community law and is becoming more so.⁴⁵⁰ It is a well-developed policy in its own right. The *Treaty of Maastricht* demanded a 'high' level of environmental protection. Commission, *RCP 1992* calls environmental policy, as embodied in article 174 of the Treaty, a "...fundamental policy of the Community.", page 52. Improving environmental protection can also further other goals. For example, the Commission points to a link between environmental protection requirements, employment policy⁴⁵¹ and industrial policy.⁴⁵²

⁴⁴⁹ For a more detailed analysis of Community environmental protection see, Krämer (2003); Vedder (2003); McGillivray and Holder (2001); Jans (2000); Grimeaud (2000); McGowan and Wilks (1995) and Baldock (1992).

⁴⁵⁰ Demetriou and Higgins (2003), pages 196 and 197.

⁴⁵¹ "Environmental policies can have a positive effect on employment, where the supply of environmental goods and services is more labour-intensive than the economic activities being replaced.", COM(2000) 576, page 10. See also, Press Release IP/03/430.

Article 6 of the Treaty (discussed in Chapter Two) says:

"Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in article 3, in particular with a view to promoting sustainable development."

Environmental protection is based on the precautionary principle, preventive action, the idea that environmental damage should be rectified at source, and the idea that the polluter should pay, article 174(2).

The Commission has referred to environmental issues within its article 81(1) analysis for some time.⁴⁵³ These references have become more frequent.⁴⁵⁴ Environmental considerations also feature prominently in article 81(3) of the Treaty, see Chapter Four.

2.2.2 The Balance?

Environmental protection and economic efficiency/ economic freedom sometimes conflict, see Chapter One. In case of conflict, do an agreement's possible environmental effects affect the appraisal of a restriction of competition for the purposes of article 81(1) of the Treaty? If so, where does the balance lie between these objectives?

Commission, *Horizontal Guidelines* contain guidelines on assessing the compatibility of environmental agreements with article 81(1).⁴⁵⁵ The Commission said that, irrespective of the parties' market share, some environmental agreements are not likely to fall within the article 81(1) prohibition, paragraph 176. For example, there will be no restriction of competition where no precise individual obligation is placed on the parties or if they are loosely committed to attaining a sector-wide environmental target. In this latter case the assessment focuses on what discretion the parties have as to the means that are technically and economically available to them to attain the environmental objective agreed upon. The more varied such means, the less appreciable the potential restrictive effects, paragraph 177. However, where environmental agreements appreciably⁴⁵⁶ restrict the parties' ability to devise the characteristics of their products or the way in which they produce them, thereby granting them influence over each

⁴⁵² This is not a linear relationship. There may come a time where increasing environmental protection undermines industrial policy. See, for example, Council Resolution, *on the automobile industry*, recitals 1 and 6 and paragraphs 4 and 5 and Council Resolution, *strengthening Community industry*, paragraph 3.

⁴⁵³ See, for example, Commission decision *D'Ieteren motor oils*, and Commission, *RCP 1990*, page 81.

⁴⁵⁴ See, for example, Commission, *RCP 1994*, pages 368-369; *ACEA*, *RCP 1998*, paragraph 131 and page 151; *CEMEP*, Commission Press Release IP/00/508 and Commission decisions *Eco-Emballages* and *DSD and others*.

⁴⁵⁵ For some time the Commission had underlined the importance of agreements between private parties to achieve environmental ends, and increasingly favoured them, see London (2003), pages 268-271.

⁴⁵⁶ But not where product and production diversity in the relevant market, is not appreciably affected, paragraph 178.

others production or sales,⁴⁵⁷ then there may be a breach of article 81(1) of the Treaty if the agreements covers a major share of an industry at national or EC level,⁴⁵⁸ paragraph 181.⁴⁵⁹ This should not be the case where the importance of environmental performance is marginal for influencing purchase decisions, paragraph 178.

A comparison can be made with how agreements on technical and other standards are dealt with under article 81(1) of the Treaty.⁴⁶⁰ Although the texts are very similar the Commission, *Horizontal Guidelines* split out the guidance on 'agreements on standards' and 'environmental agreements', sections 6 and 7, respectively. This may be because environmental agreements can be wider than agreements on standards; but it could imply that there is some difference in approach in these two areas.

Some agreements on standards breach article 81(1). In order to fall outside article 81(1) of the Treaty the standards must be objectively justified.⁴⁶¹ The Commission would probably give short shrift to an agreement to sell more polluting engines. If this is correct then, to the extent that environmental agreements are accepted, environmental goals must be objectively justifiable too.⁴⁶² This suggests that environmental protection is relevant under article 81(1).⁴⁶³

Does the fact that environmental agreements are involved affect the Commission's decision-making? The short answer seems to be yes. Under the normal (non-environmental) caselaw, the parties to an agreement may set standards but they must be free to decide whether or not to apply them. The Commission considers this freedom important.⁴⁶⁴

⁴⁵⁷ Or where they reduce or substantially affect the output of third parties, either as suppliers or as purchasers.

⁴⁵⁸ Where some categories of a product are banned or phased out from the market, restrictions cannot be deemed appreciable insofar as their share is minor in the relevant geographic market or, in the case of Community-wide markets, in all Member States, paragraph 178.

⁴⁵⁹ For instance, environmental agreements, which may phase out or significantly affect an important proportion of the parties' sales as regards their products or production process, may fall under article 81(1) when the parties hold a significant proportion of the market. The same applies to agreements where the parties allocate individual pollution quotas, paragraph 182.

⁴⁶⁰ Standardisation agreements can have an industrial policy rationale, Rosenthal (1990), page 326. This is not discussed in this chapter, but their inclusion in the guidelines (as well as elsewhere) may evidence the consideration of another policy objective in article 81(1).

⁴⁶¹ This is not absolutely clear from the caselaw but the implication is there, see, for example, Commission Notice, *Retel*, paragraph 9. See also, B&C (2001), paragraph 4-128.

⁴⁶² In at least two matters in this area the Commission noted that the environmental agreements were in line with the Community's strategy to reduce CO₂ emissions. See, *ACEA*, Commission, *RCP 1998*, paragraph 131 and page 151 and *CEMEP*, discussed in Commission Press Release IP/00/508.

⁴⁶³ The fact that the environmental benefits are emphasised in the Commission's *Competition Policy Newsletter* gives some credence to this point, see, Martínez-López (2000), pages 24 and 25.

⁴⁶⁴ See, for example, Commission decision, *VVF*, page 24 and Commission, *Horizontal Guidelines*, paragraph 167. For an exception see, Commission Notice, *Pasta manufacturers*, paragraph 3(a). There the parties agreed to

In the environmental field the Commission allows agreements to be slightly more restrictive. In *ACEA*, for example, the Association of European Automobile Manufacturers undertook, on behalf of its members, to reduce CO₂ emissions from passenger cars by setting a reduction target of 25% by 2008.⁴⁶⁵ This was a cumulative reduction target for all ACEA's members, each member set its own level. The Commission found that this would encourage ACEA's members to develop and introduce new CO₂-efficient technologies independently and in competition with one another.⁴⁶⁶ Accordingly, it decided that ACEA's voluntary agreement did not constitute a restriction of competition and was not caught by article 81(1).⁴⁶⁷

The Commission has said that environmental agreements, which impose targets on individual firms, restrict competition within the meaning of article 81(1) of the Treaty.⁴⁶⁸ The fact that the parties to the ACEA agreement were free to set their own levels seems to have prevented a finding of a breach of article 81(1). This is in line with the normal standards caselaw.

However, *Société Technique Minière*, see above, says that in order to judge whether there is a restriction of competition one must examine the clauses in their legal and economic context. What we should really ask is, do these general targets, *in fact*, have an effect on each undertaking's product range and thus on consumer choice? As the Commission accepts, see above, this is most likely where: (i) the agreement covers a significant part of the products on the relevant market; and (ii) the agreement is likely to have a binding impact on each manufacturer.

In relation to the first point, in *ACEA*, the agreement must have covered a large part of the market, the Commission called it a 'first critical step'.⁴⁶⁹ No percentages are given, but this should certainly be the case today, because a similar agreement has now been concluded with JAMA and KAMA, see above. The Commission has also said that it will try to make similar agreements with the other major groups of non-ACEA manufacturers present on the EU market.⁴⁷⁰ Each time it does this more of the market is covered. Furthermore, these agreements

undertake the relevant obligations in relation to their entire production of pasta. I can find no final Commission decision in this matter but it is unclear why it was minded to be so generous in the notice.

⁴⁶⁵ *ACEA* - COM(1998), paragraph 5(3).

⁴⁶⁶ The Commission also found that this collective effort by the European automotive industry would enable a significant reduction in CO₂ emissions to be achieved in line with EU policy, see *ACEA* - COM(1998), pages 2 and 3, where the Commission said that the ACEA commitment was consistent with the Community's strategy on CO₂ emissions from cars.

⁴⁶⁷ See also, *JAMA/ KAMA*, Commission, *RCP 1999*, pages 160-161 and *CEMEP*, cited above.

⁴⁶⁸ See, for example, *EACEM*, which was closed by comfort letter; Commission, *RCP 1998*, paragraph 130 and page 155 and Commission, *Horizontal Guidelines*, paragraph 190.

⁴⁶⁹ *ACEA* - COM(1998), pages 3 and 8.

⁴⁷⁰ *ACEA* - COM(1998), pages 7 and 8.

affect a large proportion of new motorcars. It is not entirely clear, but the implication is that, in 1998, no European manufacturers sold cars with the low levels of pollution promised in the ACEA agreement.⁴⁷¹ In which case, the agreement probably affects all new cars manufacturers by the parties for sale in the EU.

In relation to the second point, in *ACEA*, the manufacturers likely intended these targets, in effect, to bind each and every one of them.⁴⁷² The targets set are ambitious. It is unlikely that any one manufacturer can do much better than this target; allowing other manufacturers to make less effort in this regard. In addition, the Commission has said that if the targets are not met then it will legislate instead.⁴⁷³ As a result, in fact, all manufacturers must try to attain the environmental levels set for all or most of the relevant cars that they produce.

It could be argued that CO₂ emissions do not affect customer choice and so do not have an appreciable effect on competition. Even if that were so when the ACEA agreement was signed, which is doubtful, it is highly unlikely to be the case at the end of its term,⁴⁷⁴ it lasts for some 10 years.⁴⁷⁵

Most, if not all, of the manufacturers must meet the target for most, if not all, of the cars that they produce for sale in the EU, if the agreement's environmental commitments are to be achieved. They will all be trying to do so because of the threat of legislation if they fail. These commitments probably apply to all of the new cars manufactured by a substantial part of the industry. This would normally be considered a restriction on competition. The fact that it relates to an environmental commitment seems to have affected the article 81(1) balance.⁴⁷⁶

⁴⁷¹ *ACEA* - COM(1998), paragraph 3(1).

⁴⁷² In Case T-41/96 *Bayer v. Commission* [2001], paragraph 69, the CFI held "...the concept of an agreement within the meaning of article 85(1) [now article 81(1)] of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."

⁴⁷³ *ACEA* - COM(1998), pages 2, 5 and 6. The OECD points out that such threats seem to contribute significantly to target improvement, OECD (2003a), pages 11 and 15.

⁴⁷⁴ See, for example, websites such as www.autoindustry.co.uk/whatsnew/index.asp?sec=pr&key=g11. The number of references to fuel efficiency (related to CO₂ emissions) in car advertisements also belies this notion.

⁴⁷⁵ *ACEA* - COM(1998), page 7.

⁴⁷⁶ Similar points can also be made in relation to the *VOTOB* and *CEMEP* agreements. In *VOTOB*, six independent operators offering tank storage facilities in the Netherlands to third parties agreed an agenda with the Dutch government to reduce vapour emissions from their tanks over a ten-year period. The Commission attacked a later decision by the undertakings to levy a uniform environmental charge to cover, in part, the cost of investment to reduce these emissions, Commission, *RCP* 1992, points 177-186. The restriction in competition as a result of the voluntary agreement to reduce emissions itself would typically breach article 81(1)(b) of the Treaty, Vogelaar (1994), page 545. Although there was no formal decision, the Commission held that it did not fall within article 81(1) at all, Vogelaar (1994), page 551. For a different reading of *VOTOB*, see Vedder (2003), page 157.

In *CEMEP* the parties to the agreement accounted for some 80% of Community sales and made a significant commitment, agreeing to reduce their joint sales of the least efficient category three motors by some 50%. These

On the assumption that there is a balance, there have been too few cases to confidently assess where it might lie. It seems that environmental protection will be taken into account as long as, *in law*, the environmental agreement in question complies with the normal standards caselaw. The *context* is less of an issue. It is not clear why the Commission adopts this distinction. If the Commission's reasoning were more explicit we would better understand the underlying logic upon which its decisions are based.

2.2.3 Conclusion of Section 2.2.

Where environmental concerns are not internalised, conflict can occur between environmental protection and economic efficiency. What is unclear is whether conflicts can be resolved through balancing in article 81(1) of the Treaty. The inclusion of environmental protection objectives within the balance seems to allow standards to be adopted in a more demanding way than is the case without them. This implies that environmental protection is relevant within the article 81(1) balance.⁴⁷⁷ Nevertheless the position is not clear. Doubt on such a fundamental point suggests a lack of transparency.

On the assumption that there is a balance, there have been too few cases to confidently assess where it might lie. However, the Commission's decisions suggest that the importance of environmental protection, within article 81(1) of the Treaty, has changed over time. Environmental considerations were not considered there until the 1990s. Their growing influence within this provision roughly matches environmental protection's growing influence within the Treaty as a whole, Chapter Four. However, where environmental considerations are balanced against economic efficiency then it is not clear that their influence should be increasing. Why? While environmental protection is becoming increasingly important in the Community legal order (Chapter Four), as explained in Part A, economic efficiency is also becoming increasingly important, both in and of itself, and because it helps achieve other objectives that have been inserted into the Treaty over time.

Secondly, the negative welfare effect of the environmental restrictions in *ACEA* was probably quite important. The 'wrong' compromise (i.e. not the optimal balance) may be established if a

motors currently account for 70% of Community sales. The Commission argued that competition did not take place on the basis of efficiency in this industry. This is hard to believe as the buyers are sophisticated industry operators and energy efficiency is generally considered to be highly important for motors. Nevertheless, even if this is true then it is unlikely to be so by the time the agreement expires, some three years later. Furthermore, the parties also agreed to classify all of the motors covered by the agreement into one of three levels of energy efficiency. This will likely introduce competition on that criterion to the extent that it did not exist before. Why then, was a phasing-out commitment also considered necessary? If it was not necessary then should the agreement have been allowed to escape article 81(1) of the Treaty?

⁴⁷⁷ One might also ask why the Commission refers to environmental issues within article 81(1) if it is irrelevant in the analysis, Amato (1997), page 61.

structured balancing process is not carried out. The environmental benefits could be over-valued, because environmental damage would not be rectified at any cost, Chapter Eight. On the other hand, the welfare costs may be underestimated if they are not properly assessed because efficient markets have many benefits outside of welfare. More explicit reasoning is needed in article 81 decisions to clarify these issues.

2.3 Conclusion of Section 2

In *Métropole télévision* the CFI holds that the pro and anti-competitive effects of an agreement cannot be balanced within article 81(1). The rejection of a 'narrow' rule of reason in Community law also implies that non-economic objectives cannot be balanced there either. This view has been embraced by the academic community, see above, and coincides with the Commission's explicit views on the topic.⁴⁷⁸

Having said that, *Métropole télévision* was immediately followed by the *Wouters* judgment. There the ECJ seems to balance the restriction of competition against the proper practice of the legal profession and found that, as a result, article 81(1) was inapplicable. The Commission too may have changed its mind. This came across in its submissions in *Wouters*,⁴⁷⁹ as well as Commission, *Article 81(3) Guidelines*, paragraph 18(2) of which state:

"...a prohibition imposed on all distributors not to sell to certain categories of end users may not be restrictive of competition if such restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question."⁴⁸⁰

So, although there is considerable doubt about whether non-economic objectives can be balanced within article 81(1) there is increasingly reason to believe that they are. The first objective of Section 2 was to reinforce this point. That said, clarity would be significantly enhanced if the Community Courts and the Commission made a clear statement on this issue.

A second point should be highlighted in this regard. The objectives that have been discussed in article 81(1), both market integration and environmental protection, have operated in quite different ways. The former has acted to make an agreement that would not have been found to restrict competition, fall within article 81(1) of the Treaty. Environmental protection on the other hand, appears to have made an agreement that would have restricted competition fall outside article 81(1). The pros and cons of this approach are discussed in Chapter Six.

⁴⁷⁸ See, for example, Commission, *RCP 1992*, point 77 and SEC(92) 1986, Chapter D(iii). Although, Jans (2000), pages 275 and 276, suggests that these statements merely indicate that the competition rules apply to environmental agreements.

⁴⁷⁹ See the Commission submissions as reported by Advocate-General Léger, at page 1607 of his Opinion.

⁴⁸⁰ Although, Commission, *Article 81(3) Guidelines* are silent on balancing within article 81(1), as per *Wouters*.

Section 2's second objective was to illustrate where the optimal balance fell in relation to the objectives covered. On the assumption that there is a balance, there have been too few cases to confidently assess where it might lie. More clarity emerges in relation to market integration as there have been far more cases in the area and the Commission has gone to greater efforts to provide explicit guidance here.

That said, compromise within article 81(1) has had a serious impact. In *Wouters*, the objective of protecting proper practice of the legal profession outweighed a restriction of competition, limiting production and technical development, that is expressly mentioned in article 81(1)(b) of the Treaty. While environmental considerations did not outweigh a horizontal agreement to fix prices in *VOTOB*, the Commission, and possibly the ECJ, we await the judgment, seems to countenance the possibility that certain efficiency benefits might justify absolute territorial protection, which falls within article 81(1)(c).

3. TWO RELATED QUESTIONS

Section 3 discusses the two related questions that were highlighted in the Introduction to this chapter. Section 3.1. asks whether there are limits to article 81(1)'s balance; and, Section 3.2. asks why balancing takes place within article 81(1) as well as article 81(3)?

3.1 Are there limits to article 81(1)'s balance?

Section 2 argued that policy objectives are balanced within article 81(1) of the Treaty. A related issue is whether there are any limits to this balance. Assume that the optimal balance has been achieved between the two (or more) relevant policy objectives in the case in question, is this sufficient? By way of example, when the optimal balance has been assessed under the first test in article 81(3), three other tests must be fulfilled before exemption can be granted.⁴⁸¹ No equivalent tests are listed in article 81(1), does this mean that only the optimal balance is relevant?

Due to the paucity of caselaw and decisions one cannot be certain. In some matters, for example, *ACEA*, no other tests were imposed. This may be because the Commission claimed not to be balancing there. Other cases suggest that merely establishing that the optimal balance has been achieved is insufficient. For example, in *Société Technique Minière*, page 250, the ECJ held that:

"The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking."

⁴⁸¹ The *Matra Case*, paragraph 85.

Later, in *Nungesser*, the ECJ appeared to change the test somewhat, holding that, paragraph 57:

"...an undertaking established in another Member State which was not certain that it would not encounter competition from other licensees for the territory granted to it, or from the owner of the right himself, might be deterred from accepting the risk of cultivating and marketing that product; such a result would be damaging to the dissemination of a new technology and would prejudice competition in the Community between the new product and similar existing products."

It is unclear from the judgment whether the difference in language is considered and relates to the specific objectives being weighed in the balance; or, whether *Nungesser* is intended to relax the earlier test. Since *Nungesser*, the Community Courts have reverted to the test outlined in *Société Technique Minière* and, increasingly, *Nungesser* looks like an aberration. For example, in *Institute of Professional Representatives before the EPO v. Commission* the CFI held that:

"...where it is not shown that the absolute prohibition of comparative advertising is objectively necessary in order to preserve the dignity and rules of conduct of the profession concerned, the applicant's argument is not capable of affecting the lawfulness of the Decision."⁴⁸²

As a result, on the facts, the CFI found that the Commission was right to find that the absolute prohibition breached article 81(1) of the Treaty, paragraph 79. The Commission has adopted this test too. In relation to the *VOTOB* agreement, for example, it said:

"Although the Commission welcomes voluntary initiatives to improve the environmental conditions in a given sector, it has to ensure that undertakings competing in that sector do not resort to agreements which go beyond what is necessary to achieve that goal, to the detriment of competition."⁴⁸³

Likewise, in Commission Communication, *UEFA rule on 'integrity'*, paragraph 10, which was not a formal decision, the Commission said it was prepared to allow an agreement which contributed to legitimate objectives. However, it continued:

"In order to establish whether this preliminary conclusion can be upheld or not, the Commission has to know if such restrictions are limited to what is necessary to preserve the integrity of the UEFA club competitions and to ensure the uncertainty as to results. In other words, the Commission must confirm whether there are or not less restrictive means to achieve the same objective."

⁴⁸² Case T-144/99 *Institute of Professional Representatives before the EPO v. Commission* [2001], paragraph 78. Also see original Commission decision, *EPI Code of Conduct* and Commission, *RCP 1999*, pages 159 and 160 and the *Göttrup-Klim* Case, paragraph 35 "... in order to escape the prohibition laid down in article 85(1) [now article 81(1)] of the Treaty, the restrictions imposed on members by the statutes of co-operative purchasing associations must be limited to what is necessary to ensure that the co-operative functions properly and maintains its contractual power in relation to producers."

⁴⁸³ Commission, *RCP 1992*, point 177. Admittedly, it is unclear which part of article 81 the Commission is referring to here. It could have been article 81(3), point 77 may imply that environmental issues are irrelevant in article 81(1). However, this is unlikely, see the earlier reference to *Jans* (2000) in Section 2 and, as noted above, environmental issues seem relevant in *VOTOB*.

So, there is some evidence that, in addition to falling within the optimal balance, public policy objectives can only be accepted within article 81(1) where the restrictions on competition are necessary to achieve the objective, reflecting article 81(3)(a)'s reference to 'indispensable'. There is more recent support for this position from the ECJ. In *Wouters* the ECJ balanced public policy objectives within article 81(1) of the Treaty, Chapter Two. Rules needed to ensure the proper practice of the legal profession were weighed against a restriction on competition, using what seems to be a proportionality test.⁴⁸⁴

Let's briefly examine the ECJ's proportionality analysis in *Wouters*. The ECJ found a restriction of competition. This was the first interest in the balance. Then, paragraph 97 (cited in Chapter Two), the ECJ determined what the interests protected by the Bar Council rules were, see above. Next, it found that the 1993 Regulations were agreed with these interests in mind, paragraph 105. Following that, the ECJ held that the 1993 Regulation could reasonably be considered necessary to achieve that objective in the Netherlands, paragraph 107. This is the first part of proportionality test. Then, the ECJ held that the second part of the proportionality test was fulfilled. The ECJ's judgment here is quite weak, paragraph 108:

"...the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot...be attained by less restrictive means..."

Finally, paragraph 109, the ECJ held "...it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession..." This is the final part of the proportionality test. As a result, paragraph 110, the ECJ concluded that the Dutch Bar Council's rule did not infringe article 81(1) of the Treaty.

One might ask whether the 'full-blown' proportionality test used in *Wouters* is the same as the earlier 'necessity' assessment discussed above?⁴⁸⁵ The proportionality test has two parts that have not been explicitly discussed in the caselaw seen above. First, it asks whether the measure is a useful, suitable, or effective means of achieving a legitimate aim or objective. However, this is probably relevant under article 81(1) too because, for example, in *Glaxo Wellcome*, the Commission did not weigh efficiency in the balance⁴⁸⁶ because it found that the agreement did

⁴⁸⁴ See, Baquero Cruz (2002), pages 152 and 153. De Búrca (1993), page 113, reports the three parts of the proportionality test as: (1) was the measure a useful, suitable, or effective means of achieving a legitimate aim or objective? (2) was there a means of achieving that aim which would be less restrictive of the other interest (in our case competition)? (3) does the measure have an excessive or disproportionate effect on the other interest?

⁴⁸⁵ We might also ask whether the ECJ in *Wouters* applies the same test but to a different standard. It seems to have accepted the national assessments very readily. The interests in *Wouters* were national. Perhaps it was prepared to give the national authorities more leeway because of this? Chapter Seven discusses this point further.

⁴⁸⁶ Explicitly in article 81(3), but this might have been its implicit reason in article 81(1) too.

not enhance it. In any event, this point is not normally explicitly argued in the proportionality test either because it is normally fulfilled. Secondly, the proportionality test also asks whether the measure has an excessive or disproportionate effect on the other interest? This is the direct balancing of interests, weighing environmental protection against economic efficiency, for example. Section 2 argued that such balancing takes place in article 81(1) of the Treaty.⁴⁸⁷ As a result, the balancing exercise within article 81(1) seems, at least, extremely similar to the proportionality test. This is unsurprising as the proportionality test features prominently in Community law.⁴⁸⁸

Some imply that there may be different limits to the article 81(1) balancing test. Whish, for example, believes that there is a link between the test that the Community Courts and Commission use here and the ancillary restraints doctrine.⁴⁸⁹ Whish distinguishes between two types of 'ancillarity'.⁴⁹⁰ He classifies cases, such as *Société Technique Minière* and *Nungesser*, as instances of commercial ancillarity. In these judgments the restrictions, which fell outside article 81(1), were ancillary to a legitimate commercial operation. Whish distinguishes commercial ancillarity from judgments, such as *Wouters*, which he argues are based on regulatory ancillarity. He means that the restriction was not necessary for the execution of a commercial transaction but rather was necessary in order to ensure a regulatory outcome. To ensure that the ultimate customers of legal services and the sound administration of justice were provided with the necessary guarantees in relation to integrity and experience.⁴⁹¹

If Whish is correct, it would potentially add⁴⁹² two restrictions to the article 81(1) balance.⁴⁹³ First, balancing within article 81(1) would only take place to achieve a regulatory end. This

⁴⁸⁷ For an explicit expression see, Commission decision, *EPI Code of Conduct*, paragraph 40, "Even if the Commission acknowledges that the merit of the practitioner and the quality of services are essential elements of the competition between members of a liberal profession, it considers that the term "competition" also covers other elements, such as fees...and advertising. The arguments presented by the EPI to the effect that these restrictions are necessary in order to ensure the profession's reputation *do not justify obstructing access to clear and accurate information on the services in question*, how much they cost and the conditions on which they are supplied so as to enable the client to choose freely which supplier of services to engage. [my emphasis]"

⁴⁸⁸ Craig and de Búrca (1998), pages 349-357 and De Búrca (1993).

⁴⁸⁹ See also, Vossestein (2002), page 858. More generally on ancillary restraints see, Goyder (2003), pages 100-102; B&C (2001), paragraph 2-112 and Faull and Nikpay (1999), paragraphs 2.87-2.99.

⁴⁹⁰ Whish (2003), pages 117-124.

⁴⁹¹ Forrester (2005) **DRAFT**, pages 16 and 17, suggests the inclusion of other factors in the article 81(1) test, such as non-discrimination and the majoritarian rule. However, these are merely suggestions and there is no evidence of them being applied so far.

⁴⁹² I say 'potentially add' because Whish (2003), page 119, says that the 'commercial ancillarity' that he refers to is a broader concept than the 'ancillary restraints doctrine' considered in Case T-112/99 *Métropole télévision v. Commission* [2001]. I follow the CFI because it sought to explain the previous caselaw. Whish does not explain how his concept of ancillary restraint is broader than this. Perhaps, in line with Whish (2001), page 100 and 101 (the last edition of this book where he discusses the issue) he believes that the 'true' ancillary restraints test is whether the restrictions which seek to achieve a legitimate purpose are proportionate? This is more like the test in *Wouters*, than that in *Métropole télévision*. That said, some of my arguments against using this doctrine apply to this

might limit the types of objective that could be balanced within article 81(1) of the Treaty. Secondly, the restraint must be directly related, as well as necessary, to the implementation of a main operation.

It is not clear that the link with ancillary restraints doctrine is either helpful or appropriate. It is not helpful because the ancillary restraints doctrine is itself extremely imprecise, to the extent that Faull and Nikpay write that it begs more questions than it answers and is exceedingly difficult to apply.⁴⁹⁴ Linking *Wouters* and cases like it to the ancillary restraints doctrine may also be inappropriate. This is because Whish's categories of commercial restraints and regulatory restraints appear to be based on fundamentally different logic. In the CFI's words:

"If it is established that a restriction is directly related and necessary to achieving a main operation, the compatibility of that restriction with the competition rules must be examined with that of the main operation.

Thus, if the main operation does not fall within the scope of the prohibition laid down in article 85(1) [now article 81(1)] of the Treaty, the same holds for the restrictions directly related and necessary for that operation...If, on the other hand, the main operation is a restriction within the meaning of article 85(1) but benefits from an exemption under article 85(3) [now article 81(3)] of the Treaty, that exemption also covers those ancillary restrictions."⁴⁹⁵

Therefore, the main operation must be examined under article 81(1) of the Treaty. If it falls outside that provision then any restrictions of competition that are directly related to and necessary for achieving the main aim are also safe. The ECJ in *Wouters* did not assess whether the restraint was directly related to the legitimate aim⁴⁹⁶ and, crucially, it did not assess the legitimate aim itself under article 81(1) of the Treaty.⁴⁹⁷ Furthermore, as Whish accepts,⁴⁹⁸ the

stance too. They are that embracing the ancillary restraints doctrine may not: (1) be helpful as it is unclear; and (2) be appropriate because the idea of regulatory ancillarity is based on a different logic from that of 'normal' ancillarity, see below.

⁴⁹³ Case T-112/99 *Métropole télévision v. Commission* [2001], paragraph 104, "In Community competition law the concept of 'ancillary restriction' covers any restriction which is directly related and necessary to the implementation of a main operation..."

⁴⁹⁴ Faull and Nikpay (1999), paragraphs 2.90-2.93. See also, Korah (2000), pages 63 and 64. For example, matters such as Case 161/84 *Pronuptia v. Irmgard Schillgallis* [1986], particularly paragraph 24, imply that this doctrine does not apply to all restraints. This view may change as a result of the appeal in Commission decision, *Glaxo Wellcome and others*, still pending.

⁴⁹⁵ Case T-112/99 *Métropole télévision v. Commission* [2001], paragraphs 115 and 116. See also, Commission, *Article 81(3) Guidelines*, paragraph 28.

⁴⁹⁶ As we have seen, the ECJ assessed whether the restriction was a useful, suitable, or effective means of achieving the legitimate aim (the proper practice of the legal profession). It was even prepared to accept that there was not a means of achieving that aim which would be less restrictive of competition, i.e. that it was 'necessary'.

⁴⁹⁷ The expressions 'ancillary', 'ancillary restraint' and 'directly related' are not used in the *Wouters* judgment.

⁴⁹⁸ Whish (2003), page 121.

ECJ in *Wouters* performed a balancing exercise. The CFI specifically rules that this does not take place in relation to ancillary restraints:

"...it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of article 85(3) [now article 81(3)] of the Treaty."⁴⁹⁹

It may be better to view *Wouters*, and cases like it, as examples of balancing within article 81(1) of the Treaty, unrelated to the ancillary restraints doctrine. Furthermore, while one must probably show that the restriction:

- achieves the optimal balance; and
- is necessary to achieve the public policy objective;

there is no evidence of the parties having to show that competition has not been eliminated, nor that customers have got a fair share, as article 81(3) demands.⁵⁰⁰

3.2 Why does balancing take place within article 81(1) as well as article 81(3)?

Chapter Six argues that the best place for weighing non-economic objectives within article 81 of the Treaty is 81(3). Nevertheless, some balancing seems to occur in article 81(1). Why is this taking place there? As Whish writes, if it were not for the procedural difficulties, analysis of the policy objectives under article 81(3):

"...would seem to be the natural way to approach a case such as this, given the bifurcated structure of article 81."⁵⁰¹

What is the procedural backdrop he was referring to and was it the relevant factor? The 'agreements' at issue in *Wouters* (and *Albany*⁵⁰²) had not been notified to the Commission and

⁴⁹⁹ Case T-112/99 *Métropole télévision v. Commission* [2001], paragraph 107. Also see paragraphs 108-112 and Commission, *Article 81(3) Guidelines*, paragraph 30.

⁵⁰⁰ Whish suggests that, in principle, *Wouters*' reasoning could be applied to any regulatory rule adopted for the protection of consumers. This argument is probably based on paragraph 97 of the judgment (that is the only place where 'consumers' is mentioned). However, as we have seen above, the rule may already be even wider than that, indeed this is also the implication of paragraph 97 too (which talks of ensuring "...that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees..."). The Commission may have been balancing environmental requirements within article 81(1) in *VOTOB*, although, as stated above, this is unclear. In *VOTOB* the Commission looked at the benefit for society as a whole. Furthermore, as we saw above, Commission, *Article 81(3) Guidelines*, paragraph 18(2), state "...a prohibition imposed on all distributors not to sell to certain categories of end users may not be restrictive of competition if such restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question." The examination of the effects is not limited to consumers.

⁵⁰¹ Whish (2003), page 123.

⁵⁰² Cooke (2005) DRAFT, page 10 and 11, asks whether *Albany* was a one off. Would the result have been the same if decided under article 81(3)? He believes that these public policy requirements could not fall within article 81(3); but why does Cooke find it easier to imply words into article 81(1) than 81(3)? He seems to explain why, page 10

would have been void, article 81(2) of the Treaty.⁵⁰³ This would have caused a lot of uncertainty in relation to these and other professional regulations.⁵⁰⁴ By balancing in article 81(1), the ECJ ignored the letter of the Treaty, but ensured that the referring court could achieve the 'right' result (or at least consider all relevant values⁵⁰⁵) when it decided the case at hand. Joliet insists that Community competition law has a tendency to interpret substantive law provisions in light of the procedural regulation, rather than adjusting the procedural framework to reflect the substantive rules.⁵⁰⁶ Perhaps for this reason the ECJ has been prepared to balance under article 81(1), *in extremis*?

Now that those procedural rules are no longer in place, the notification regime has gone and the whole of article 81 is directly applicable,⁵⁰⁷ can we expect to see the end of cases such as *Wouters*? The Commission casts some doubt on this conclusion.⁵⁰⁸ In at least two matters, Commission Communication, *UEFA rule on 'integrity'* and Commission decision, *EPI Code of Conduct* the Commission was prepared to balance non-welfare objectives under article 81(1) when it could have used article 81(3) of the Treaty. The 'precedent' value of these matters can be disputed.⁵⁰⁹ Particularly, when in matters such as Commission decision, *Glaxo Wellcome*, the Commission seemed more prepared to discuss different objectives under article 81(3) when this was available. That said, as we have seen, Commission, *Article 81(3) Guidelines*, paragraph 18(2), speaks of the consideration of health and other issues within article 81(1), under certain circumstances. These guidelines were written in light of the new procedural rules. Only time

"...it may well have been more difficult to embark on so radical a departure from existing jurisprudence." But, as explained in Chapters Two and Four, the departure would not have been so great.

⁵⁰³ They were horizontal agreements and did not fall within a block exemption. See, Regulation 17, article 9(1) and Case *NV L'Oréal v. De Nieuwe* [1980], paragraph 13. On what 'void' means in this context see, Whish (2003), pages 286-288; Goyder (2003), pages 138-140 and B&C (2001), Chapter 10.

⁵⁰⁴ Deards (2002), pages 624 and 625.

⁵⁰⁵ *Wouters* was decided at the same time as the Enron scandal, where accountants were found to have done ignored standards of conduct, Forrester (2005) DRAFT, page 6. Perhaps the legal profession sought to distance itself from this?

⁵⁰⁶ Joliet (1967), page 174.

⁵⁰⁷ Regulation 1/2003, articles 1, 5 and 6.

⁵⁰⁸ So do others, for example, Forrester (2005) DRAFT, page 17, argues that *Wouters* "...will have descendants." See also, Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL and Others v. Jean-Marc Bosman* [1995], paragraph 77.

⁵⁰⁹ The UEFA matter did not go to a final decision. Perhaps the basis for the reasoning would have changed if it had? Commission decision, *EPI Code of Conduct* was a final decision, that said, the Commission received the parties' notification very late (it was sent in reply to a statement of objections, see paragraphs 1 and 2 of the decision). Because exemption decisions could only apply from the moment of notification, Regulation 17, articles 4(1) and 6(1), the agreements would have been void before then. This effect, which no longer holds after 1 May 2004, may have 'forced' the Commission to balance within article 81(1) in way that it would no longer do today. On appeal, the CFI also accepted balancing in article 81(1), see above. It could have been motivated by the same reasons as the Commission.

will tell whether, in fact, article 81(1)'s scope will be restricted in the future. Chapter Six explains why, in our view, mere-balancing should not take place within article 81(1) of the Treaty.

3.3 Conclusion of Section 3

It is far from clear whether balancing is even taking place within article 81(1) of the Treaty. As a result, efforts to divine the content of further rules related to such balancing are fraught with difficulty and open to error. That said, there is at least an indication that where we wish to consider non-competition objectives within article 81, only those that are proportionate may be accepted.

As has been noted above, when balancing under article 81(3) four cumulative tests must be satisfied. This includes the two mentioned in relation to article 81(1), the pure balance and the necessity requirement, which together essentially make up the proportionality test. Does this mean that where a non-welfare objectives are balanced against competition under article 81(1), they are more likely to 'win' than when the same occurs under article 81(3)? No clear answer can be given at this stage, but it seems that while the institutions are less keen to balance under article 81(1), when this happens, non-economic objectives may be more likely to 'win'.⁵¹⁰ The pros and cons of this outcome are discussed in Chapters Six and Seven.

It remains to be seen whether *Wouters* and cases like it, will be repeated after 1 May 2004. If so, then this will likely strengthen the position of non-welfare objectives within the Treaty, compared to that of competition.

4. CONCLUSION OF CHAPTER THREE

Chapter Six argues that the best place for a political balancing process is article 81(3) of the Treaty. The Community Courts and the Commission have often said the same. This does not seem to accord with the reality of the decision-making under article 81(1), so Chapter Three investigated further.

Chapter Three argues that a balancing process is taking place within article 81(1). That said, it does not seem to be widespread as yet, in the sense that it has not been applied to many objectives. Furthermore, factors such as environmental protection are rarely given much weight against the more entrenched article 81(1) objectives, such as, economic efficiency, economic freedom and market integration. Nevertheless, the balance does seem to shift somewhat in their presence. Finally, the four cumulative article 81(3) tests are not all applied within article 81(1) balancing. More concrete conclusions are impossible due to the lack of clarity in the cases and

⁵¹⁰ Whish (2003), page 123.

decisions. However, it may be helpful to list some general points that have arisen as a result of the discussion so far:

- the Community Courts and the Commission should explicitly state whether public policy objectives can be balanced within article 81(1) of the Treaty.

If they should be considered there then the Commission should explain:

- which objectives can be balanced within article 81(1);
- the content of each policy objective must be clearly stated.⁵¹¹ This helps us to ascertain:
 - why the objective is being pursued. For example, if objective A is pursued to achieve objective B, then, when both arise in the same case and they appear to conflict, we should normally ignore the conflict and simply try to achieve objective B; and
 - the importance of the objective, both in relation to its own qualitative importance, but also because this might be enhanced where it also contributes to the achievement of other relevant objectives;
- can balancing lead to a restriction of competition falling outside article 81(1) of the Treaty; as well as an agreement that does not restrict competition falling within that provision?
- a clearer explanation of where the optimal balance lies between the relevant public policy objectives, as well as an explanation of why this is so, so this can be extrapolated out for other conflicts;⁵¹²
- if the optimal balance changes over time, for example, after a Treaty amendment, then this should be clarified by the Commission, or in the Treaty;
- if per se rules are used, when balancing different objectives, these must be based on solid economic thinking. Furthermore, the fact that they are per se rules should be made clear, to discourage unnecessary litigation;
- when it is appropriate to balance under article 81(1), as opposed to article 81(3) of the Treaty; and

⁵¹¹ See, for example, the Commission's comments regarding the lack of definition of Community industrial policy in COM(90) 556, page 1.

⁵¹² This is particularly important as London says that there is not even agreement between DG Competition and DG Environment about where the balance is in environmental cases, London (2003), page 271.

- whether article 81(3)'s four cumulative conditions must also be fulfilled when balancing under article 81(1) of the Treaty.

We now turn to the balancing under article 81(3) of the Treaty. Chapter Four examines mere-balancing; then, Chapter Five investigates a second method that the Commission uses to weigh different objectives, market-balancing.

CHAPTER FOUR: HOW IS THE BALANCE IMPLEMENTED? - MERE-BALANCING IN ARTICLE 81(3) OF THE TREATY

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|------|---|
| 1. | Introduction |
| 2. | Compromise within Article 81(3) of the Treaty |
| 2.1. | Economic efficiency |
| 2.2. | Market integration |
| 2.3. | Environmental protection |
| 2.4. | Consumer protection |
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| 2.6. | Industrial policy |
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| 3. | What is the Balance? |
| 4. | Conclusion |

1. INTRODUCTION

Part B's Introduction said that two types of balancing take place: 'mere balancing' and 'market balancing'. Chapter Three analysed mere-balancing in relation to article 81(1) of the Treaty. Chapter Four looks at mere-balancing within article 81(3) of the Treaty. Chapter Five considers the second type of balancing, market-balancing.

Once it has been established that article 81(1) has been infringed⁵¹³ then the agreement can be examined under article 81(3) of the Treaty.⁵¹⁴ Public policy objectives may be (and have been) considered under article 81(3). As the CFI has emphasised:

"...in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under article 85(3) [now article 81(3)] of the Treaty."⁵¹⁵

In its analysis of mere-balancing under article 81(3)'s first test,⁵¹⁶ Section 2 discusses how seven public policy objectives are weighed against restrictions of competition. The objectives considered are: economic efficiency, Section 2.1.; market integration, Section 2.2.; environmental protection, Section 2.3.; consumer protection, Section 2.4.; culture, Section 2.5.; industrial policy, Section 2.6.; and the security of the energy supply, Section 2.7. Article 81(3) of the Treaty is used more frequently for mere-balancing than article 81(1). Many of these

⁵¹³ In order for the Commission to be considering article 81(3) of the Treaty, it must normally have shown that article 81(1) has been infringed, see B&C (2001), paragraph 3-010 and Commission, *Article 81(3) Guidelines*, paragraph 40.

⁵¹⁴ Commission, *Article 81(3) Guidelines*, paragraph 11.

⁵¹⁵ Joined Cases T-528/93, etc., *Métropole Télévision v. Commission* [1996], paragraph 118. See, also Chapter Two; Whish (2003), pages 152-156; Monti (2002); B&C (2001), paragraphs 3.042-3.045; Whish and Sufrin (2000), pages 148-150; Faull and Nikpay (1999), paragraphs 2.129-2.153; Ehlermann (1998); Gerber (1994), page 140 and Bouterse (1994).

⁵¹⁶ Chapter Seven considers the presence of non-economic objectives within article 81(3)'s other conditions.

objectives are given a lot of weight in article 81(3)'s balance. Section 3 examines the limits of the balance under article 81(3).

Once again, the resolution of these questions is important in terms of providing greater legal certainty to undertakings; and, helping the Member States' courts and competition authorities to apply article 81 in an open and consistent manner.

2. COMPROMISE WITHIN ARTICLE 81(3) OF THE TREATY

2.1 Economic efficiency

While there is some debate about whether economic efficiency is relevant in an article 81(1) analysis, there is no such discussion in relation to article 81 as a whole. Although there are no references to the concept in the Community Courts' article 81 jurisprudence⁵¹⁷ the concept regularly occurs in the doctrine, see above, as well as in Commission Regulations and Notices.⁵¹⁸

Economic efficiency carries a lot of weight and is used in both a positive and a negative sense within article 81(3)'s balance. This means that if an agreement enhances economic efficiency then it is given extra weight in the balance. Agreements which are felt to reduce or undermine economic efficiency are less likely to be exempted, i.e. given negative weight in the balance. That said, many criticise the standard of economic analysis in the cases and decisions⁵¹⁹ and this could certainly be improved. The Commission is taking steps to do so, for example, with the appointment of the Chief Economist.

Chapter Five deals with economic efficiency in detail, as does the rest of Chapter Four. As a result, economic efficiency is not discussed separately here.

2.2 Market integration

Section 2.2. deals with article 81(3)'s market integration/ economic efficiency balance. Chapter Three discussed the goals of both the economic efficiency and market integration objectives. It was unclear what was meant by market integration and why it was pursued. The same lack of clarity is present in article 81(3) of the Treaty. Market integration weighs heavily in the balance. Other objectives are also balanced against market integration within article 81(3), for example culture. These are examined later Section 2.

⁵¹⁷ With the exception of the *Matra* Case, paragraph 89, where the CFI merely summarises the parties' arguments.

⁵¹⁸ See, for example, the *New Motor Vehicle Block Exemption*, recitals 4-6; the *Vertical Restraints Block Exemption*, recitals 5-7 and 13; Commission, *Horizontal Guidelines*, paragraphs 10, 27-29 and Commission, *Article 81(3) Guidelines*, paragraphs 13 and 33.

⁵¹⁹ See, for example, Neven, Papandropoulos and Seabright (1998), page 166 and Ehlermann (1998), pages 367, 368, 595 and following.

2.2.1 The Balance?

Under article 81(3) of the Treaty, attempts to impose absolute territorial protection through an agreement that appreciably affects trade between Member States will not normally be exempted and fines will likely be imposed.⁵²⁰ For example, the *Vertical Restraints Block Exemption*⁵²¹ lists territorial protection as a hardcore restraint, preventing agreements containing absolute territorial protection from falling within it. Nor is absolute territorial protection acceptable under the *New Technology Transfer Block Exemption*, article 4. This was also the case under article 81(1) of the Treaty, Chapter Three.

In Commission decision, *Glaxo Wellcome*,⁵²² the parties argued that absolute territorial protection would increase consumer welfare, and contribute towards increased public health, industrial policy, economic and social cohesion and competitiveness, paragraphs 89-99. The Commission did not accept this argument on the facts. However, it did consider it in detail and, while its decision is slightly unclear on this point, see paragraphs 124 and 152 and page 186, it might well have allowed absolute territorial protection if it had been persuaded that this was justified on the merits.⁵²³

However, as with article 81(1), it is unclear whether economic arguments, such as Glaxo's, will prevail. This is because we do not know why market integration is pursued. The Commission explains its position thus:⁵²⁴

"Market integration has also been promoted by current policy which ensures that distribution systems can never establish absolute territorial protection. Thus, even though the pro-competitive gains from granting territorial exclusivity are permitted, vertical agreements must still leave open the possibility of alternative sources of supply. Markets cannot be sealed off to prevent intermediaries exploiting price differences."

As we saw in relation to article 81(1), there are two possible reasons for such a statement. Either: (i) market integration is justified by the economic efficiency objective, and the Commission has merely created a per se rule, believing that absolute territorial protection nearly always undermines economic efficiency; or (ii) the absolute territorial protection prohibition is

⁵²⁰ The sole exception that I can find, and it relates only to indirect restrictions on exports to achieve absolute territorial protection, is Commission decision, *Transocean Marine Paint Association* (1967), page 14. This is an early exception to the general rule. Later Commission exemptions of this agreement did not allow absolute territorial protection, Commission decisions, *Transocean Marine Paint Association* (1974), page 20; *Transocean Marine Paint Association* (1980), paragraph 7 and *Transocean Marine Paint Association* (1988), paragraph 15. Commission decision, *Sicasov*, is not an exception to this rule as the purchasers in the relevant territory could export, see below.

⁵²¹ The *Vertical Restraints Block Exemption*, recital 10 and article 4(b).

⁵²² Now under appeal, Case C-168/01 P.

⁵²³ Although such hope has been voiced before, Gyselen (1984), pages 649 and 650.

⁵²⁴ COM(96) 721, Executive Summary, page VII, paragraph 26. See also, Executive Summary, page VI; Case 27/77 *Tepea v. Commission* [1978], paragraph 57.

not purely based on an efficiency rationale. Perhaps it is based on consumer protection or integrationist grounds, see Chapter One?

An absolute prohibition is hard to justify under either head. In the *Matra* Case, the CFI held that:⁵²⁵

"...in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in article 85(3) [now article 81(3)] of the Treaty are satisfied..."

Unlike under article 81(1) of the Treaty, *per se* rules are unacceptable under article 81(3), unless they always achieve the optimal balance. Chapter One showed that an absolute prohibition on absolute territorial protection would not always be justified on economic efficiency, consumer protection or integrationist grounds.

More recently the Commission has been more clearly economic in its policy statements. As we saw above, the Commission, *Vertical Guidelines* emphasise an economic approach and do not prohibit absolute territorial protection *per se*. Furthermore, the Commission, *Article 81(3) Guidelines* imply that market integration is there to achieve welfare ends.⁵²⁶ While the Commission seems convinced that absolute territorial protection is generally not efficient it is more open to persuasion. The ECJ's judgment in the appeal of Commission decision, *Glaxo Wellcome* should clarify these points. Perhaps the ECJ will define market integration in non-economic terms? If not, the 'balance' should focus upon economic efficiency where absolute territorial protection is welfare enhancing, as there will not be a conflict at all.

As we have said before, absolute territorial protection is an extreme. Restrictions on both active and passive sales are possible under article 81(3) of the Treaty. This is not surprising because, to the extent that this is a balancing exercise, the less market integration is undermined, as formally defined, then the easier it should be to outweigh it. These more limited forms of territorial protection are more readily accepted here than under article 81(1).

Passive sales can sometimes be restricted. Although, as explained by the Commission, *Vertical Guidelines*, paragraph 50, this is not the case under the *Vertical Restraints Block Exemption*.⁵²⁷ Nevertheless, it may well be possible to get an individual exemption if it could be shown that exemption were necessary in order to encourage the distributor to bear the costs of entering a

⁵²⁵ The *Matra* Case, paragraph 85. Also see, for example, Commission decision, *Glaxo Wellcome*, paragraph 153.

⁵²⁶ Paragraph 13. Furthermore, in its discussion of the guideline's first condition, Section 3.2., the Commission focuses exclusively on efficiency issues. See also, paragraph 21.

⁵²⁷ The *Vertical Restraints Block Exemption*, article 4(b). The exceptions to this principle in article 4(b)-(d) are special cases, mainly related to selective distribution and are not exactly on point, although they do also relate to exclusive distribution.

new product or geographic market.⁵²⁸ This is on the condition that the actors do not have too much market power in relation to customers and competitors.⁵²⁹ Under Commission, *New Technology Transfer Block Exemption*, the licensor can restrict his or her ability to make passive sales into a licensee's territory.⁵³⁰ Restrictions on passive sales by licensees into an exclusive territory reserved for the licensor are also possible,⁵³¹ as are those into other licensees' territories.⁵³² The Commission allows these restrictions on passive sales between a licensee and its licensor because:

"It is presumed that up to the market share threshold such restraints, where restrictive of competition, promote pro-competitive dissemination of technology and integration of such technology into the production assets of the licensee."⁵³³

It is easier to justify restrictions on passive sales under article 81(3) of the Treaty than it was under article 81(1).⁵³⁴ This is partly because the Commission is more willing to accept a wider range of economic efficiency arguments under article 81(3). This tendency may increase in the shadow of the *Métropole télévision* Case, see Chapters Three and Six.

As one might expect, exemption is even more likely for active sales restrictions (where there are no passive sales restrictions).⁵³⁵ Active sales bans are allowed under the *Vertical Restraints*

⁵²⁸ See the examples cited in Commission, *Vertical Guidelines*, paragraph 174.

⁵²⁹ See the examples cited in Commission, *Vertical Guidelines*, paragraph 163.

⁵³⁰ Commission, *Technology Transfer Guidelines*, paragraph 99, up to the market share threshold of 30%. In relation to the market share thresholds see, Commission, *New Technology Transfer Block Exemption*, article 3.

⁵³¹ Commission, *New Technology Transfer Block Exemption*, article 4(2)(b)(i).

⁵³² Where the territory has been allocated by the licensor to another licensee and this is the first two years that this other licensee is selling the contract products in that territory, article 4(2)(b)(ii). Non-reciprocal passive sales restrictions are also possible, even where the parties are competing undertakings, Commission, *New Technology Transfer Block Exemption*, article 4(1)(c)(iv).

⁵³³ Commission, *Technology Transfer Guidelines*, paragraph 100. Similar reasons for the allowing the restriction between licensees too, see paragraph 101, "...it is often the case that licensees would not enter into the licence agreement without protection for a certain period of time against...passive sales into their territory by other licensees."

⁵³⁴ See, for example, Commission, *Technology Transfer Guidelines*, paragraph 101, "Restrictions on passive sales into the exclusive territory of a licensee by other licensees...often fall outside article 81(1) for a period of up to two years from the date on which the product incorporating the licensed technology was first put on the market in the exclusive territory by the licensee in question. However, to the extent that in individual cases such restrictions are caught by article 81(1) they are block-exempted."

⁵³⁵ Some applaud the difference in approach to active and passive sales. They say that the main justification for territorial protection is to prevent free riders. As "...the most effective way for the free rider to use the marketing efforts of another is through active sales...", allowing active sales and preventing passive sales makes sense, Monti (2002), page 1067. While this view holds under the *Vertical Restraints Block Exemption*, as we have seen, passive sales are allowed under Commission, *New Technology Transfer Block Exemption*, precisely because of the free rider argument, see Commission, *Technology Transfer Guidelines*, paragraph 101. It is not clear that the distinction between the Commission's approach to active and passive sales is based purely on this reading of the free rider problem, but rather on a balance between policy objectives.

Block Exemption, where the restriction does not limit sales by the buyer's customers.⁵³⁶ While no explanation is given by the Commission as to why the balance should shift in favour of economic efficiency in this way, in a similar provision in the *Exclusive Distribution Block Exemption*, which the *Vertical Restraints Block Exemption* replaced, the Commission justified its position by saying, recitals 5 and 6:

"...exclusive distribution agreements lead in general to an improvement in distribution because the undertaking is able to concentrate its sales activities, does not need to maintain numerous business relations with a larger number of dealers and is able, by dealing with only one dealer, to overcome more easily distribution difficulties in international trade resulting from linguistic, legal and other differences;

...exclusive distribution agreements facilitate the promotion of sales of a product and lead to intensive marketing and to continuity of supplies while at the same time rationalizing distribution; whereas they stimulate competition between the products of different manufacturers; whereas the appointment of an exclusive distributor who will take over sales promotion, customer services and carrying of stocks is often the most effective way, and sometimes indeed the only way, for the manufacturer to enter a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings; whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in the agreements terms providing for the promotion of sales..."

These are efficiency arguments. Similar arguments are used in Commission, *Vertical Guidelines*, paragraphs 161-163.

Active sales can be restricted under Commission, *New Technology Transfer Block Exemption* even more easily than passive sales and they are not restricted in time.⁵³⁷

One example of the ease of justifying territorial protection under article 81(3), as opposed to article 81(1), can be found in Commission decision, *Sicasov*. Under the agreement, Sicasov groups together the breeders of plant varieties protected in France, paragraph 1. It is the only company in France to do this, paragraph 3. Among other things, Sicasov's role is to manage the plant varieties entrusted to it by its breeders. These breeders may give Sicasov the right to grant non-exclusive multiplication and sales licences or an exclusive production and sales concession, paragraph 2.

The Commission considered an obligation on licence holders not to export certified seeds directly from France for a period of 4 years from the registration of the variety in the common catalogue. The Commission said that this prevented licence holders both from conducting an active sales policy outside France and from meeting unsolicited demands from customers in

⁵³⁶ Article 4(b). As long as the other provisions of the block exemption are adhered to, for example the market share of the supplier must not exceed 30% of the relevant market, article 2(1).

⁵³⁷ See, Commission, *New Technology Transfer Block Exemption*, article 4(2)(b).

other Member States. This means that the only way that seeds can be exported is via a third party undertaking established in France, paragraph 62. The Commission found that this made purchases "...more difficult and less advantageous than those made direct from licence holders." This reduced competition in the other Member States in breach of article 81(1), paragraph 63.

The Commission then looked at article 81(3) and applied, by analogy, the *Old Technology Transfer Block Exemption*, paragraphs 70-73. The Commission felt that the prohibition on exporting certified seeds contributed to improving production and distribution and promoting technical and economic progress. Why? It explained, paragraph 74, that:

"First, it facilitates the dissemination of new varieties in Member States other than France by encouraging undertakings in those Member States to accept the risks involved in producing and/or marketing new varieties selected by the French breeders. Those firms will be more inclined to undertake the dissemination of new varieties if they can be certain that they will not have to contend with direct exports from France during the launch period. It is therefore appropriate to conclude that, during this period, French breeders should have the right to protect their licence holders and distributors (in Member States other than France) against direct competition from French licence holders by imposing on the latter contractual clauses prohibiting them from exporting certified seeds. Licence holders and distributors in Member States other than France, who will normally have a better knowledge of the respective markets than the French breeders, will be able to market seeds belonging to new varieties in optimum conditions and provide users with regular and adequate supplies.

Secondly, the export prohibition improves the organisation of the production and distribution of seeds in France by encouraging French licence holders to concentrate their efforts on French territory with a view to providing user farmers with regular and adequate supplies."

These benefits will be preserved as parallel exports from France are allowed, paragraph 75. The Commission also noted that the *Old Technology Transfer Block Exemption* allowed for the prohibition of active and passive sales, paragraph 74, which is the same under the new one, see above. The Commission added that there is no need to treat the holders of plant breeders rights any differently from those holding any other intellectual property right, paragraph 51.

Why wasn't *Sicasov* cleared under article 81(1) of the Treaty, in the light of the similarities between the arguments used by the Commission in favour of exemption here and those used by the ECJ in favour of negative clearance in *Nungesser*, see Chapter Three? This is less important since 1 May 2004, although it is still relevant for certain purposes, such as the burden of proof.⁵³⁸ The issue is further discussed in Chapter Six.

Before concluding this part we should examine one more issue. Market integration is largely used as a negative factor to block what would otherwise be an acceptable agreement. Because of

⁵³⁸ See, Commission Regulation 1/2003, article 2.

this it is not normally examined alone in article 81(3), but rather in relation to another factor which it is being balanced against, such as economic efficiency or environmental protection.

However, there are some signs that the beneficial effects that an agreement allegedly has on market integration has, on occasion, been successfully argued in order to *support* an exemption which might otherwise not have been allowed, i.e. market integration can have positive weight in the balance too. One possible example of this can be found in a Commission comfort letter, *BDO Binder International*. There the Commission held that an agreement between an international network of accountancy firms fell within article 81(1) because it made it more likely that the parties would refer the case to the 'right' firm geographically rather than doing it themselves, although they were allowed to do the work themselves if they wanted to under the agreement. However, the Commission found that article 81(3) was applicable. The article 81(1) interests were outweighed by the:

"...increased ability to compete on an international scale with larger competitors and of increased cross-border co-operation..."⁵³⁹

Without denying the relevance of industrial policy in this case, market integration seems to have a lot of positive weight in the balance as well.

2.2.2 Conclusion of Section 2.2.

Market integration is, to a large extent, being treated as formulaically as it was under article 81(1) of the Treaty. There is still an absolute ban on absolute territorial protection. This makes little sense from either an economic or an integrationist perspective, especially where there is strong inter-brand competition. It is not even clear whether this position is based on a balancing on the merits or whether it is merely there to provide clarity because of the belief that absolute territorial protection nearly always undermines consumer welfare. Such a ban is wrong in law.

The Commission seems more prepared to accept economic integration arguments outside of absolute territorial protection. Once again, one can clearly see the balance shifting as market integration, as formally defined, is infringed less and less. The Commission seems to see a conflict between market integration and economic efficiency. No satisfactory attempt is made to explain the weighting or to justify this shift.

Market integration is given more weight under article 81(1) than article 81(3). This may be because not all economic efficiency arguments are acceptable under article 81(1) of the Treaty, post *Métropole télévision*. Commission decision, *Sicasov* shows that the Commission is willing

⁵³⁹ Commission, *RCP 1991*, page 335 and Press Release IP/91/602. See also, Commission decisions, *Banque Nationale de Paris - Dresdner Bank*, paragraph 18 and *EBU/Eurovision*, paragraph 61.

to accept economic efficiency arguments within the framework of article 81(3) to a degree that it is not willing to do in article 81(1) of the Treaty.

Market integration has long been an important Treaty objective. It has been used to provide positive and negative weight in the balance. At one level at least, clarity is present with respect to absolute territorial protection, but it is difficult to understand the rationale for the Commission's position. As regards the rest, neither clarity nor justifications abound. The time has long since come to explain why market integration is important, whether there is a conflict with economic efficiency and to place this all within a formal balancing mechanism.

2.3 Environmental protection

While it is not exclusively the case, most environmental agreements are weighed in the balance against economic efficiency. Chapter One noted that these two objectives can conflict, where the environmental considerations have not been internalised.

Environmental protection is increasingly important in the balance.⁵⁴⁰ In Commission decisions from as far back as 1983⁵⁴¹ it was considered within article 81(3) of the Treaty. However, in those decisions, made at around the time that environmental protection's policy-linking clause was added by the *Single European Act 1987* (then article 130r(2)), environmental protection was probably a marginal consideration. Its inclusion does not seem to have had much influence on the outcome of the balance. The *Maastricht Treaty 1992* inserted environmental protection into both articles 2 and 3 of the Treaty. In addition, the Treaty now aimed at a high level of environmental protection, article 130r(2). Furthermore, the wording of the policy-linking clause was beefed up. No longer was environmental policy merely a "component of other policies" but it was to be "integrated into the definition and implementation" of these other policies, article 130r(2). Its growing importance in article 81's balance is in line with its increasing influence as a Treaty objective.⁵⁴² Shortly before the *Maastricht Treaty's* changes entered into effect, the Commission mentioned environmental protection within its article 81(3) analysis in at least three further decisions,⁵⁴³ there was also a 1994 decision which considered it.⁵⁴⁴ It has been considered in other decisions since then, see below. However, there is no indication that environmental protection has had decisive weight in these decisions. In other words, arguably,

⁵⁴⁰ Monti (2002), pages 1073-1075 and 1078, agrees.

⁵⁴¹ Commission decisions, *Carbon Gas Technologie*, paragraph 1 of the article 81(3) discussion and *BBC/Brown Boveri*, paragraph 23.

⁵⁴² For a more detailed discussion of the growing importance of environmental policy in the Treaty see, Wasmeier (2001), pages 160 and 161 and Vogelaar (1994), pages 530-534.

⁵⁴³ Commission decisions, *Assurpol*, paragraph 38; *Ford/Volkswagen*, paragraph 26 and *Exxon/Shell*, paragraph 68.

⁵⁴⁴ Commission decision, *Philips-Osram*, paragraphs 25-27.

the environmental factor alone has not yet warranted exemption in a formal Commission decision, see below.

2.3.1 The Balance?

The Commission has said that improving the environment is regarded as a factor that contributes to improving production or distribution or to promoting economic or technical progress.⁵⁴⁵ It then tried to show the limit of the weight of environmental protection in the balance. While accepting that these limits might be altered if certain types of agreement were necessary to protect the environment, the Commission listed certain infringements on market integration and economic efficiency that environmental protection would not normally outweigh:

"The Commission intends, however, to remain very firm with regard to the principle of non-closure of national markets to foreign operators. It will also be very vigilant about problems of access by third parties to a system and about agreements which could result in a product being squeezed out of the market. The Commission also takes a negative view of multilateral tariff or price fixing resulting from an agreement on the environment; its assessment will, however, be on a case-by-case basis and will look at whether any such agreement is indispensable. The aim of environmental protection is not necessarily sufficient in itself to warrant an agreement on prices being regarded as indispensable."⁵⁴⁶

So, in 1995 the Commission delimited the outer boundaries of the balance. Environmental protection considerations will not normally justify the closure of national markets, squeezing products out of the market and price fixing. It is not clear whether environmental protection will outweigh other restrictions on competition, but the implication is that it could.

⁵⁴⁵ Commission, *RCP 1995*, paragraph 85. See also, Gyselen (1994), pages 255 and 256. Commission, *Horizontal Guidelines*, paragraph 193, explains "Environmental agreements caught by article 81(1) may attain economic benefits which...outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs." The Commission only refers to 'economic benefits'. What about the environment? In fact, the Commission goes on to refer to article 174(3) of the Treaty and European Parliament and Council Decision, *review of 'Towards Sustainability'*, article 7(d). These discuss the need to assess the costs and benefits of taking action, as well as developing economic evaluation techniques for doing so. So it seems that, when the Commission refers to 'economic benefits' in paragraph 193, it means 'net benefits in terms of reduced environmental pressure resulting from the agreement'.

Based on Commission, *Horizontal Guidelines*, paragraph 193, Komninos (2005) **DRAFT**, page 36, implies that 'economic benefits' means that the Commission only takes account of non-economic objectives which "...have economic parameters and can always be measured as such." Chapter Eight discusses the benefits of a common meter. Nevertheless, it also emphasises that these meters have limits. Decision-making cannot become a simple sum and Komninos is undoubtedly going too far. How could one value, for example, the security of the energy supply? The Commission emphasises the need to develop economic evaluation techniques. However, non-economic objectives can be considered within article 81 even where this has not been done. In relation to impact assessments more generally the Commission, after explaining that it was desirable to quantify economic, social and environmental impacts in monetary terms, said "Impacts that cannot be expressed in quantitative or monetary terms should not, however, be seen as less important as they may contain aspects that are significant for the policy decision.", COM(2002) 276, page 16.

⁵⁴⁶ Commission, *RCP 1995*, paragraph 85.

Before analysing the balance we should examine some Commission guidelines on assessing environmental protection's weight in the balance. In Commission, *Horizontal Guidelines*, paragraph 194, it said:

"...[the agreement's] costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions."

There is some confusion in the language, because paragraph 194 is probably discussing two article 81(3) tests, the optimal balance (test one) and that consumers must get a fair share of the resulting benefit (test two).⁵⁴⁷ These are not easy to separate out.

As regards environmental costs, the Commission considers effects on third parties (as well as the parties to the agreement and their customers). This is particularly important in relation to environmental issues. Why? Because, as externalities, see Chapter One, they are not adequately priced by the parties because they ignore the costs for third parties, which can be great.

In relation to the benefits side of the balance, the position is less clear. The Commission refers to two stages. First, do consumers individually have a positive rate of return under reasonable payback periods? *EACEM* probably falls within this head, see below. The lifetime economic costs fell, as a result of the environmental improvements reducing electricity consumption. If this test is not fulfilled,⁵⁴⁸ then we must also check whether net benefits for consumers in general are likely. The first point is that if consumers as individuals do not benefit, then it is unlikely that consumers (collectively) will benefit either. This implies that paragraph 194's reference to 'net benefits for consumers in general' refers not to *consumers of the relevant products* but to society at large. The Commission seems shy of admitting to the overtly political task of balancing public and private benefits. However, by assessing the benefits, for society as a whole, rather than the actual consumers of the product, the Commission makes it even easier to include non-welfare objectives in the balance.⁵⁴⁹ It is similar to adopting a total welfare approach for economic efficiency, i.e. not one based on a partial equilibrium, see Chapter Five.

⁵⁴⁷ Commission, *Horizontal Guidelines*, paragraphs 32-34. The same occurred in Commission decision, *CECED*, paragraphs 47-57. See also, Vedder (2003), pages 165-170.

⁵⁴⁸ Although in Commission decision, *CECED*, paragraphs 47-57, the Commission discussed both individual and collective effects. There the agreement fulfilled both categories. This seems unnecessary under the Commission, *Horizontal Guidelines*, as they now stand.

⁵⁴⁹ The Commission adopted a similar argument in Press Release, IP/94/151.

This distinction became more prominent in Commission decision, *CECED*, which seems to confirm this interpretation of 'consumer', see below.⁵⁵⁰

Now let's examine the balance. In Commission, *RCP 1998*, paragraph 130 and page 152, the Commission approved, by comfort letter, the agreement signed by the European Association of Consumer Electronics Manufacturers (EACEM) and sixteen of its members, all major manufacturers of television sets and video cassette recorders.⁵⁵¹ The agreement was a voluntary commitment to reduce the electricity consumption of this equipment when it is in stand-by mode. The manufacturers who entered the scheme undertook to meet certain targets on power use. This sort of co-ordinated action, said the Commission, falls within article 81(1) of the Treaty.

The Commission exempted the agreement under article 81(3) of the Treaty on the ground that the energy-saving and environmental benefits of the scheme clearly represented technical and economic progress. The energy saving could amount to 3.2 TWh a year from 2005, a report from DG XVII (Energy) said. The maximum cost per unit of reducing the standby power use of a television or video recorder was estimated at ECU 3. No individual firm in the industry felt able to introduce lower power use in its products. Margins are low in the industry and the firms feared that consumers would not be prepared to pay in advance for power savings, although they would save money in the long term. The consumer electronics industry therefore devised the voluntary scheme in consultation with the Commission. This reduction in energy consumption, said DG Competition, will have a significant impact in terms of the management of energy resources, reductions in CO₂ emissions and, accordingly, measures to counter global warming.

Environmental benefits clearly flow from this agreement. Furthermore, DG Competition may have focused exclusively on these benefits to justify exemption. Not only that, but the reason the consumer electronics industry gives for needing the agreement, the fact that these energy savings will push up the purchase price by about ECU 3 and that consumers would not be prepared to accept this, implies that environmental protection has been accepted in the face of static economic efficiency losses. Neither they nor the Commission feel able to trust consumers to take account of the reduced operating costs of this equipment in their purchasing decisions.⁵⁵²

⁵⁵⁰ Although it should be stressed once more that the Commission has merged article 81(3)'s first and second tests here and the issue is unclear. Furthermore, one may question whether paragraph 194 should present the individual and society assessments as alternative, as opposed to cumulative, tests. This may undermine article 81(3)'s second test, see Chapter Seven.

⁵⁵¹ Also see, the Commission's position in *Spa Monopole/GDB*, reported in Commission, *RCP 1993*, paragraph 240.

⁵⁵² This is in stark contrast to the position adopted in Commission decision, *CECED*. There the Commission said, paragraph 12, "Electricity consumption is essential in the operation of washing machines. It also accounts for a major share of operating costs during their long lifetime (12 years on average in the Community). Through the EC energy label, consumers can easily assess the cost-effectiveness of a choice amongst different energy categories. In

Nevertheless, this voluntary agreement has not altered the balance that much. Although static allocative efficiency is reduced by the agreement, the effect should not be great because there is no agreement on price, nor is there agreement on which technology to adopt. Despite this, the matter was an important first step towards the use of environmental protection as a sole justification for exemption. That said, although the Commission noted the significant impact that the agreement would have, in terms of CO₂ emissions, it also found that consumers would save in the long-term. This was because the small increase in the cost price was less than the future savings that they would make in their electricity bills. Economists prefer a dynamic, rather than a static, allocative efficiency assessment, see Chapter One. We do not have access to the Commission's data or reasoning and so it is difficult to be decisive, but it may be that the Commission decided the matter purely on economic grounds, i.e. that the lifetime cost would fall.

EACEM should be compared with Commission decision, *CECED*, which came only two years later. *CECED* is, to our knowledge, the first formal Commission decision giving environmental protection significant importance in the balancing process.⁵⁵³ It concerned an agreement between *CECED*, a Brussels-based association comprising manufacturers of domestic appliances and national trade associations, and its members. These companies made up some 95% of the relevant market. The agreement concerned the market for domestic washing machines in the EEA. The facts were discussed in more detail in Chapter Two.

The Commission found that the agreement breached article 81(1) as the parties to the agreement bound themselves "...to cease producing and/ or importing into the Community..." certain categories of washing machines on criteria relating to their energy efficiency, reducing consumer choice and technical diversity. The Commission believed that the agreement would appreciably raise production costs, probably also reducing demand. It would also reduce the demand for electricity. Despite this, the Commission cleared the agreement under article 81(3) of the Treaty.

addition to economic factors, advertising campaigns often stress energy performance, thereby differentiating products, in a context where environmentally friendly products attract more and more consumers. Thus, energy-efficiency has an influence on purchasing decisions, and hence on competition between manufacturers." It could be that, as the Commission found in *CEMEP* (Press Release IP/00/508), no competition took place on this basis in relation to televisions and that is why it intervened. This is an unconvincing explanation however as some television adverts focus on energy efficiency.

⁵⁵³ Some believe that Commission decision, *CECED* was only decided on environmental grounds, see, for example, van Gerven (2004), page 430, "...the environmental benefits must have been decisive." and Lenz (2000), pages 65-71. Although, a lot of emphasis was placed on these considerations, other objectives were probably also relevant, see below. In fact, to my mind, no formal Commission decision has exempted based on environmental factors alone. Vedder (2003), pages 162-169 and Monti (2002), pages 1073-1075 and Vogelaar (1994), page 547, are ambiguous about what weight environmental protection has been given here, so far.

The Commission raises two potential benefits. First, while these machines will cost more initially, money will be saved on electricity bills over their lifecycle. This argument is undermined by the fact that new energy efficient machines will not likely be introduced in the medium term. Secondly, the Commission notes the costs of otherwise avoiding the CO₂ and SO₂ emissions which the energy efficiency will prevent. The Commission estimates that these savings will be some seven times greater than the additional consumer costs. This cannot be taken into account as an economic efficiency criterion because these costs have not yet been internalised. Therefore, the benefits can only be those of society, as opposed to the individual consumers concerned. Chapter Eight explains why invoking environmental considerations in this way is inappropriate.

2.3.2 Conclusion of Section 2.3.

Where the environmental externality has not been internalised, environmental protection and economic efficiency can conflict. To the extent that these costs have not been internalised then some form of balancing must take place.

Environmental protection is now an important element in the article 81(3) balance⁵⁵⁴ and the importance of the Commission decision, *CECED* should not be overlooked. The parties agreed to limit production, in direct contravention of article 81(1)(b) of the Treaty.⁵⁵⁵ A horizontal agreement this extensive is likely to result in the elimination of a significant amount of cheaper goods from the Community. This is likely to push up prices. Speculative dynamic efficiency gains have been chosen at the expense of concrete (at least short term) allocative efficiency losses.⁵⁵⁶ Not only that, but the environmental problem has not even been attacked at source, contrary to article 174(2) of the Treaty, i.e. the real problem is the effects of electricity generation/ use. As the Commission accepts, this issue could be more efficiently reduced by looking at generators and not washing machines.⁵⁵⁷

Environmental protection was the Commission's inspiration in *CECED*.⁵⁵⁸ What is debatable is whether environmental protection considerations have yet outweighed economic efficiency in

⁵⁵⁴ Whish and Sufrin (2000), page 149, agree that environmental protection is given significant weight under article 81(3), "Benefits to the environment led to an exemption..." There are many other examples of environmental protection being considered in the balance. See, for example, Commission, *RCP 1998*, paragraphs 133 and 134 and pages 152 and 153; Commission, *RCP 2000*, page 148; Commission, *RCP 2001*, page 36; Press Release, IP/01/850; Commission decision, *DSD and others* and Press Release, IP/01/1279.

⁵⁵⁵ Also see, the Commission, *Horizontal Guidelines*, paragraph 2.

⁵⁵⁶ See, the Commission, *Horizontal Guidelines*, paragraph 32.

⁵⁵⁷ Commission decision, *CECED*, paragraphs 51 and 55.

⁵⁵⁸ See, Commission, *RCP 2000*, paragraph 97, "The Commission decision to exempt the agreement [in *CECED*] takes account of this positive contribution to the EU's environmental objectives, for the benefit of present and future generations."

the balance. This seems unlikely. In *CECED* the Commission emphasised that the lifecycle costs had fallen.⁵⁵⁹ Nevertheless, environmental considerations will be increasingly important in article 81(3) in the future (as they were under article 81(1)). Why? First of all, this seems to be the political will of the Member States. The *Declaration on article 175 of the Treaty*, attached to the *Treaty of Nice*, said:

"The High Contracting Parties are determined to see the European Union play a leading role in promoting environmental protection in the Union and in international efforts pursuing the same objective at global level. Full use should be made of all possibilities offered by the Treaty with a view to pursuing this objective, including the use of incentives and instruments which are market-oriented and intended to promote sustainable development."

Perhaps because of this the way that the Commission conducts the balance now makes it easier to take account of factors such as environmental protection. For example, the Commission looks at the benefits to society as a whole, rather than just those 'directly affected' by the agreement.

Secondly, there is evidence to suggest that the Commission is becoming increasingly confident in its use of environmental protection in the balance; or at least the increasingly ready to rely upon it there. For example, in Commission decision, *CECED* the parties agreed to cease producing/ importing certain goods into the Community. As they make up some 95% of the relevant market this is likely to effectively squeeze such goods out of the Community altogether. This is a significant amount of goods, some 10% of washing machines sold in the Community at the date of the agreement, paragraphs 13 and 66. This is in direct contravention of the Commission's own statements in this regard in 1995, see above.⁵⁶⁰

Thirdly, the two basic justifications that the Commission uses in *EACEM* and *CECED* are essentially the same. First, while the agreement will increase the initial purchase price of the good, this will be compensated for by reduced electricity bills. Secondly, there will also be huge benefits to the environment. However, in *EACEM*, the focus was very much on the first reason, which makes the environmental and economic efficiency conflict disappear. In *CECED*, while the Commission found that customers would make savings over the lifecycle of the washing machine, paragraph 52, it seems to put the greater emphasis on the greater benefits to society as a whole, paragraphs 47-51. Perhaps because the first set of benefits would not occur in the short term. This is also a sign of the Commission's growing confidence in environmental protection criteria.

⁵⁵⁹ In a more recent decision, Commission decision, *ARGEV, ARO*, a recycling scheme was cleared under 81(3) of the Treaty, but this also seems to have been done purely on economic considerations.

⁵⁶⁰ This implies that the balance may have shifted. The Commission may have also relaxed its original position in relation to agreements on prices and closure of national markets to foreign operators, see Commission decision, *Eco-Emballages and Biffpack, Dikap and Wastepack*, in Commission, *RCP 2000*, page 148.

Finally, in *EACEM* there was only a comfort letter while in *CECED* the Commission adopted a decision. This shows an increasingly confident Commission prepared to risk an appeal on an environmental point.

It is entirely appropriate to give environmental protection more weight, in light of the fact that a high level of environmental protection is demanded in the Treaty, article 174(2) of the Treaty, combined with environmental policy's policy-linking clause, article 6. This view is supported by the general absence of the consideration of such 'public goods' by businesses to date. Nevertheless, it should not be forgotten that, in the examples discussed, environmental protection is competing against economic efficiency. Here economic efficiency must, at the very least, be contributing towards the Community's consumer protection, employment and industrial policies. These have increased in power and importance too. The lack of structure in the Commission's balancing analysis may have led it to conduct an incomplete assessment, not giving enough weight to these other objectives. Time will tell.

2.4 Consumer protection⁵⁶¹

The cases where consumer protection has been considered in article 81(1) of the Treaty are few and far between. This makes it hard to discern the weight that consumer protection would be given in the balance there, so Chapter Three essentially ignored it. Nor has consumer protection been expressly invoked many times within article 81(3)'s balance.⁵⁶² This part considers agreements where consumer protection conflicts with economic efficiency. First we briefly examine the consumer protection head itself.

2.4.1 Consumer Protection

Consumer protection has been defined extremely widely. Article 153(1) of the Treaty implies that the concept includes:

"...protecting the health, safety and economic interests of consumers, as well as...promoting their right to information, education and to organise themselves in order to safeguard their interests."

Lane writes that while consumer protection has been recognised as a legitimate objective of Community law, capable of justifying barriers to the free movement of goods "...the Court has

⁵⁶¹ For a more detailed analysis of Community consumer protection see, Cseres (2004); Stuyck (2000); Weatherill (1997); Reich (1997); Averitt and Lande (1996-7); Lonbay (1996) and Reich and Woodroffe (1994).

⁵⁶² One reason may be that the second article 81(3) test says that agreements must allow "...consumers a fair share of the resulting benefit..." Perhaps consumer protection issues can be considered there? Chapter Seven discusses this provision. Sometimes the Commission collapses article 81(3)'s first two tests, 'technical or economic progress' and 'a fair share of the resulting benefit', into the same discussion, for example, Commission decisions, *CECED*, paragraphs 47-57 and *Visa International - Multilateral Interchange Fee*, paragraphs 74-95 and Commission, *Horizontal Guidelines*.

always given priority to the requirements of the common/ internal market."⁵⁶³ In 1994 Advocate-General Tesauro argued that:

"...considerations relating to *consumer protection*...should not be unconnected with the interpretation of article 85 [now article 81] of the Treaty."⁵⁶⁴

Since then, we have seen the addition of article 153(2) of the Treaty, consumer protection's policy-linking clause. This was inserted by the Treaty of Amsterdam and reads:

"Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities."

Consumer protection has, at times, been given positive weight in the article 81(3) balance, although only in conjunction with other factors.⁵⁶⁵ This part considers a decision where it was given negative weight.

2.4.2 The Balance?

In Commission decision, *Grundig's EC distribution system*, the Commission (re)affirmed an article 81(3) exemption of an agreement between one of Europe's largest manufacturers of consumer electronics products equipment and its selective distributors.

According to the decision, the agreement contained two clauses that the Commission found restrictive of competition. An obligation on wholesalers and retailers to stock the entire range of Grundig products and an obligation on retailers to display a representative selection of these products, paragraph 35. The Commission said that these restrictions were justified by the nature of the products, paragraphs 36-41. It exempted the agreement. This is the end of the matter as far as the official decision is concerned, consumer protection was not discussed.

However, when discussing this decision, the Commission wrote:⁵⁶⁶

"...in the interests of better consumer protection, the Commission asked Grundig to amend its warranty terms so that, even where a defective item was purchased in another Member State, a consumer could have it repaired under warranty in the Member State in which he lived. To that end, Grundig intends to introduce a uniform, Europe-wide, contractual comprehensive warranty and has begun building up an appropriate network of repair shops. It has undertaken, pending completion of the network, to honour all cross-border warranty claims on an *ex gratia* basis."

⁵⁶³ Lane (1993), pages 959 and 960.

⁵⁶⁴ Case C-376/92 *Metro SB-Großmärkte v. Cartier* [1994], paragraph 33. Although Advocate-General Tesauro clearly refers to the whole of article 81 in this quote the context of these comments imply that he is only really discussing article 81(1) of the Treaty, see paragraphs 29 and 41 in particular. As mentioned above, this has not happened much within article 81(1).

⁵⁶⁵ See, for example, Commission decision, *CECED*, paragraphs 47-57.

⁵⁶⁶ Commission, *RCP 1993*, paragraph 243.

The implication here is that, in the form originally notified to the Commission, the agreement contained an additional restriction of competition for the purposes of article 81(1) of the Treaty. Faulty Grundig goods could only be repaired under warranty in the Member State in which they were originally purchased. Such a clause normally falls foul of article 81(1).⁵⁶⁷

But what of the actual balance found in the *Grundig's EC distribution system* decision? It seems that, originally, the Commission found at least three restrictions of competition. As we have seen, without the restriction relating to the guarantee, the agreement would have been justified under article 81(3) on the basis of pure economic efficiency criteria, paragraph 36. The fact that Grundig agreed to amend the agreement implies that without this change the exemption would not have been granted.

The implication is that in an agreement where the economic efficiency factors, in the Commission's mind, outweighed the restrictions on competition, the Commission was prepared to refuse an exemption purely on consumer protection grounds. No other grounds are mentioned in Commission, *RCP 1993*. This suggests that consumer protection can have a strong negative weight in the balance.

2.4.3 Conclusion of Section 2.4.

This matter raises a number of points. First, what was the motivation for preventing these types of clause? In *ETA v. DK Investment*, paragraph 14, the ECJ said:

"A guarantee scheme under which a supplier of goods restricts the guarantee to customers of his exclusive distributor places the latter and the retailers to whom he sells in a privileged position as against parallel importers and distributors and must therefore be regarded as having the object or effect of restricting competition within the meaning of article 85(1) [now article 81(1)] of the Treaty."

In this case, the issue was slightly different in that the guarantee only applied to customers of the exclusive distributor. In *Grundig's EC distribution system*, as we have seen, the guarantee only applies in the country of purchase. However, what is interesting for our purposes is that both provisions affect consumer rights as well as affecting market integration, as formally defined.

In *ETA v. DK Investment*, a case from 1985, the ECJ 'prohibited'⁵⁶⁸ the clause. It is not clear why, although the court uses the traditional language of the market integration objective. In the latter decision, of 1993, the Commission explicitly focused on consumer protection to justify its intervention, market integration is not mentioned. Does this change in emphasis point to a

⁵⁶⁷ See, Case 31/85 *ETA Fabriques d'Ébauches v. DK Investment* [1985] and Commission, *Vertical Guidelines*, paragraph 49.

⁵⁶⁸ As this was an article 234 reference the ECJ does not actually prohibit the clause in law.

different basis for the challenge? In other words, now consumer protection justifies intervention, whereas before, although it is not clear, the ECJ's motivation was probably market integration related? Alternatively, is the Commission explaining that the market integration objective justifies this action, based on the alleged consumer protection benefits, see Chapter Three?

Whichever of the last two suggestions is right, there is a hint of an increase in importance (and weight?) of consumer protection in the balance, either directly, or as an underlying objective. The complete absence of a market intervention discussion, or language, in the Commission's decision implies that consumer protection, and not market integration, was the objective upon which the Commission relied.⁵⁶⁹ The implication being that, at least since 1993, consumer protection is an article 81 objective in its own right.

The Commission is prepared to rely on consumer protection, although it has not got to the stage of relying exclusively on this in a decision as yet.⁵⁷⁰ Is the growing influence of consumer protection justified and was it justified in 1993? Consumer protection was inserted into the Treaty as an article 3 objective (as well as given its own article demanding a high level of protection) by the *Maastricht Treaty 1992*, which came into force in November 1993. Just in time, the *Grundig's EC distribution system decision* was taken on 21 December 1993. Thus the basis for relying on consumer protection is certainly there. However, as Chapter One points out, consumer protection is probably better achieved by focusing on economic efficiency. This may mean that there should not be a conflict at all. Even if this is not the case here, efficient markets bring with them many other benefits, including many favoured within the Treaty. This should give economic efficiency a lot of weight. A proper balancing system would expressly take account of this. One wonders why, if the Commission was confident of its balance, it did not include such reasoning in its decision.

On the other hand, before the Commission introduces consumer protection issues as a separate head into the balance, it should show that they are not already internalised by consumers. Although many of these buyers will not be sophisticated, these products are often expensive and one might have expected purchasers to ensure that the warranty covered them, or at least take this issue into account when they considered the original purchase of the product. Presumably, people that buy from parallel importers get the product cheaper than those that buy directly from Grundig's distribution network?

Another point relates to the value of the policy-linking clauses. Consumer protection's policy-linking clause was not added until the *Treaty of Amsterdam* in 1997. What effect do the policy-

⁵⁶⁹ One would be more hesitant to conclude this if the ECJ in *ETA v. DK Investment*, had said that it based its decision purely on market integration grounds, but it was ambiguous. Furthermore, various Treaty revisions since 1985 have changed the optimal balance.

⁵⁷⁰ Note the comments in this regard in paragraph 19 of the decision, as opposed to the operative part.

linking clauses have? In Chapter Seven, we argue that they have an important legal certainty function. This is because they help litigants force the Commission to take account of these objectives in its decisions. But is that the limit of their effectiveness? It may be that the consumer protection policy-linking clause gives the Commission the confidence to rely exclusively on this Treaty objective in its decisions in the future? As we will see when we look at the security of energy supply head, policy-linking clauses may be helpful, but are not necessary, in this regard.

In conclusion, consumer protection can be dealt with outside of the specific balance with which this section deals, see Chapter Five. However, on occasion it has been considered within our framework. Consumer protection seems able to display either positive or negative weight in the balance. And, in at least one case, consumer protection was given significant weight in the balance. Indeed, it was given so much weight that it would have prevented the exemption of an agreement that was otherwise acceptable on economic efficiency grounds.

2.5 Culture⁵⁷¹

Cultural issues have been raised in a number of cases. This has generated a need to balance cultural policy against two other distinct Treaty objectives, namely market integration and economic efficiency.⁵⁷² Lane says that the real threat to, especially the less widespread cultures, is often the "...homogenisation that is a necessary product of the Treaty and the internal market."⁵⁷³ Indeed, culture has been defined as "...resistance to the transformation of certain traditional values..."⁵⁷⁴ To the extent that economic efficiency leads to market integration there may be a conflict between it and cultural objectives too.⁵⁷⁵

2.5.1 Culture

Community action shall be aimed at, article 151(2) of the Treaty:

"...improvement of the knowledge and dissemination of the culture and history of the European peoples; conservation and safeguarding of cultural heritage of European significance; non-commercial cultural exchanges; artistic and literary creation, including in the audiovisual sector."⁵⁷⁶

Article 151(1) of the Treaty says:

⁵⁷¹ For a more detailed analysis of culture within the Community see, Tunney (2001); Bouterse (1994) and Loman, Mortelmans, Post and Watson (1992).

⁵⁷² Fleming (2002), page 751.

⁵⁷³ Lane (1993), page 954.

⁵⁷⁴ Fukuyama (1992), page 215.

⁵⁷⁵ Although this need not always be the case, see Commission decisions, *EBU/ Eurovision System* and *Eurovision*.

⁵⁷⁶ There is ambiguity as to exactly what article 151 of the Treaty means by cultural protection, Tunney (2001), pages 173-176.

"The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."⁵⁷⁷

Chapter Two noted that there is also a policy-linking clause for culture, article 151(4) of the Treaty. This stresses that:

"The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."⁵⁷⁸

Cultural issues have been discussed in several cases before the Community Courts, both implicitly⁵⁷⁹ and explicitly.⁵⁸⁰ There have been many "cultural battles" in the context of the free movement provisions.⁵⁸¹ Article 30 of the Treaty allows restrictions on the free movement of goods for "...the protection of national treasures possessing artistic, historic or archaeological value..." Lane writes that close scrutiny of the free movement cases shows that the Community courts are "...ill inclined to place the interests of cultural protection over those of the internal market."⁵⁸² Nevertheless, the ECJ may have paid heed to article 151(4) of the Treaty, which had just been added by the Maastricht Treaty, in the *Keck and Mithouard* case.⁵⁸³ This judgment paved the way for cultural "exceptions" to article 30.

Cultural arguments have also been raised under article 81(3) of the Treaty⁵⁸⁴ and the Commission maintains that:

"Protection of culture is...a concern that has always been borne in mind in applying the competition rules that effect businesses. Although culture is not mentioned by name in

⁵⁷⁷ There is a lot of confusion about exactly what is being promoted. Culture is not defined, see above, but it seems that one can take account of Community (what is this?), national and regional cultures. Tunney notes that the word "flowering" is "...certainly different to preservation and conservation, and suggests a commitment to dynamism.", Tunney (2001), page 175.

⁵⁷⁸ Advocate-General La Pergola said of this provision, "...culture is regarded, in the Treaty, as a, so to speak, 'transversal' value, which potentially touches upon every sector of activity within the Community.", Case C-42/97 *European Parliament v. Council* [1999], page 880.

⁵⁷⁹ Although it was not raised specifically in the case, the refusal to allow Germany to continue to apply its Beer Purity Laws in Case 178/84 *Commission v. Germany* [1987] was considered an important attack on their culture.

⁵⁸⁰ Case C-180/89 *Commission v. Italy* [1991], particularly paragraph 20; Joined Cases 60 and 61/84 *Cinéthèque v. Fédération nationale des cinémas français* [1985], paragraphs 16, 22 and 24.

⁵⁸¹ For example, Case C-159/90 *Society for the Protection of the Unborn Children Ireland Ltd. v. Grogan* [1991].

⁵⁸² Lane (1993), page 954, see also pages 955 and 956.

⁵⁸³ Case C-267 and 268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993].

⁵⁸⁴ The *Coöperatieve Stremsel* Case, pages 861-862, the French Government appears to use cultural arguments in part; the *Coditel* Case, page 3391, the respondents used a purposive cultural argument; the *VBVB and VBBB* Case; possibly, Case T-66/89 *Publishers Association v. Commission* [1992], as the case turned on indispensability, apparently accepting the underlying cultural point, paragraph 72; and the *Échirolles* Case, Advocate-General Alber argues that article 151(4) means that "...the Community has to take cultural aspects into account in...the field of competition...", paragraph 41. France and Norway appear to agree, see, paragraph 15 of the Opinion.

articles 85 and 86 [now articles 81 and 82], the Commission takes account of the cultural dimension when investigating cases in the light of those provisions. Yet the aim is not to frame a policy on culture or to make value judgments in applying the provisions, but rather to assess business practices with due regard to the repercussions they could have on the Community's cultural policy."⁵⁸⁵

As it did in relation to environmental policy, the Commission seeks to disguise the fact that balancing these values demands political decisions. While competition law is certainly not the only, or the best, tool through which to pursue one's cultural policy, Chapter One, the Commission cannot avoid making 'value judgments' when applying the cultural provisions in article 81. Indeed, 'assessing business practices with due regard to the repercussions they could have on the Community's cultural policy' means precisely weighing the benefit of these business practices against the cultural effects.

2.5.2 The Balance?

The principal area of tension is in relation to resale price maintenance agreements for books. Such systems are often characterised by the fact that the publisher, often in accord with other publishers, must fix a resale price for the books that he or she publishes and ensure that this is followed at the point of retail sale.⁵⁸⁶ Such clauses are normally looked at in a negative light, because they restrict competition.⁵⁸⁷

The Commission accepted that there was a conflict between culture and market integration/ economic efficiency and sought to find a balance between these objectives in Commission, *RCP* 1993, at paragraph 177:

"...the Commission is currently investigating several cases involving resale price maintenance systems for books. This is machinery set in place by publishers in several Member States to prevent active price competition between publishers and between booksellers...The Commission has in the past repeatedly stated that it could regard such resale price maintenance arrangements for books as compatible with the competition rules provided that they are individual and purely vertical. In other words, while the Commission cannot agree to prices, pricing methods or conditions of sale being established collectively by all publishers, it can, on the other hand, countenance a system whereby an individual publisher lays down the conditions of sale and retail prices of his books in the bookshops. In taking such a stance, the Commission is of course conscious of the need to afford some form of protection to publishers of books produced in smaller print runs, a consideration which influences its analysis of the conditions of competition. A system of individual resale price maintenance protects booksellers offering ranges of books of more limited appeal, and therefore produced in smaller print runs. This is another important example of how the Commission reconciles the concerns of cultural policy with application of the competition rules."

⁵⁸⁵ Commission, *RCP* 1993, paragraph 175. See also paragraphs 176 and 177.

⁵⁸⁶ See, for example, the *VBVB and VBBB* Case, paragraph 6.

⁵⁸⁷ See Commission, *Vertical Guidelines*, paragraphs 47, 111 and 112.

Note that this is an important European competition rule that is potentially being breached. The ECJ has said that price competition is so important that it can never be eliminated.⁵⁸⁸ Here, the Commission is prepared to restrict competition for cultural aims. This could have a serious affect on the degree of price competition, see below.

However, the Council does not believe that the Commission's balance has gone far enough. This has led to some tension between these institutions. As discussed in Chapter Two, a Council decision, from 1997,⁵⁸⁹ addressed this specific issue. There the Council noted article 152 of the Treaty, as well as the dual character of books as:

"...the bearers of cultural values and as merchandise; strongly emphasising the importance of a balanced assessment of the cultural and economic aspects of book..."

Then it went on to acknowledge:

"...the importance attached by a number of Member States to fixed book prices as a means of maintaining and promoting the diversity and broad accessibility of books, in the consumer's cultural interest, and that the national authorities of those Member States have accepted the restriction of competition entailed by fixed book prices on the grounds of general cultural importance..."

The Council goes on to note that it considers:

"...that the inclusion in the Treaty of article 128(4) [now article 151(4)] has created a new situation, the consequences of which must be clarified with respect to the application of Community competition rules to cross-border fixed book prices..."

The Council asks the Commission to study the significance of article 151(4) for the implementation of article 81 of the Treaty that may concern cross-border fixed book prices. The Commission should indicate, if appropriate, the ways to enable fixed book-price regulations/agreements within homogeneous linguistic areas to be applied, and submit its conclusions to the Council. By this it appears to ask the Commission to accept horizontal as well as vertical retail price maintenance agreements.

Commission, *RCP 1997*, refers to a study on publishing that the Commission had commissioned. This study has not been opened to the public. Nevertheless, there is a brief discussion, at page 361, where the Commission says:

"The study had a number of questions to answer on the publishing market. Its purpose was to find out whether systems of retail price maintenance for books have the positive impact on the market which their proponents believe they have. The questions put to the consultants concerned a number of European countries (with and without retail price maintenance) and the US and dealt with the growing number of publishers, concentration in

⁵⁸⁸ The *Metro I* Case, paragraph 21.

⁵⁸⁹ Council, *Decision on Fixed Book Prices*. Also note European Parliament Resolution, *on book prices in Germany and Austria* and Council, *Resolution on Fixed Book Prices 2*.

publishing, the structure of the retail sector, state subsidies for the book sector, the relation between hardback books and paperback books, price trends, title production and other matters. The study concludes that as far as the alleged advantages of book retail price maintenance are concerned, namely to further title production, to prevent concentration in publishing, to guarantee a wide network of retail outlets and to keep prices down for the consumer, countries with retail price maintenance have no substantial advantage, if any, over countries without."⁵⁹⁰

This study suggests that, at least in the area of retail price maintenance for books, there is no conflict between cultural policy and market integration/ economic efficiency. In the light of this study will the Commission change the policy approach that it outlined in Commission, *RCP 1993*, see above? The Commission's study's findings were contradicted by a European Parliament study.⁵⁹¹ What will the Council (and the European Parliament) do next? What about the Member States' courts and competition authorities?

2.5.3 Conclusion of Section 2.5.

In conclusion, three points should be highlighted. First, the content of the cultural objective has not been properly debated, nor is the interaction between the objectives fully explained. There is ambiguity as to exactly what article 151 of the Treaty means by cultural protection. Even within that article there is a potential conflict between 'conservation and safeguarding' (presumably, the Member States' cultures) and the 'need to improve the knowledge of and dissemination of Member State cultures'. While fixed book prices may have been thought to achieve the former there is no discussion about how they affected the latter. This is particularly important because the dissemination of Member State cultures may coincide with the market integration objective.⁵⁹² Not only that, but these agreements undermine economic efficiency (at least in the allocative sense) and this likely reduces market integration.

Secondly, cultural issues have been balanced against important Treaty objectives, namely market integration and economic efficiency. The Commission was unprepared to accept horizontal resale price maintenance. However, for cultural reasons, the Commission was prepared to exempt certain restrictions of competition, namely vertical resale price maintenance

⁵⁹⁰ In Press Release, IP/98/30, in relation to a matter where the Commission had released a statement of objections, it noted, under the improvement of production or distribution in article 81(3) of the Treaty, that "It is not at all clear that the profits generated by the system of fixed prices are in fact being ploughed back into the production of less popular books with a higher cultural value. And in countries where fixed prices have been abolished, such as Sweden, Belgium, Finland and the United Kingdom, the production and distribution of books have not been damaged."

⁵⁹¹ European Parliament Resolution, *on common book price-fixing across borders*, which, on the basis of article 95 of the Treaty, has issued a report containing a draft directive on the fixing of book prices, European Parliament, *Report on Book Price Fixing Directive*.

⁵⁹² Commission decision, *EBU/ Eurovision System*.

between publishers and booksellers, that it would probably not otherwise have accepted.⁵⁹³ This gives cultural objectives a lot of weight. This is particularly important because, while cultural considerations have always been present in the Treaty, culture as a general heading on its own, and its policy-linking clause, were only introduced by the *Maastricht Treaty*. Furthermore, the Treaty does not demand a high level of cultural protection. Sometimes, in order to protect a specific value, it must take priority over others that are normally considered more important. This is a political task.

Finally, the 1997 Commission study suggests that the Council and the Member States are incorrect in their assertion that resale price maintenance for books furthers cultural aims in the way that they suggest. The Commission is less likely to tolerate exceptional distortions of competition in this area in future. This may lead to the revocation, at least in practice, of the Commission's 1993 statement, cited above. However, it must be underlined that this is not because the balance has shifted between cultural and other values. The Commission increasingly believes that there is no conflict between these competing values in this area. It now seems to accept that the positive advantages that it believed flowed from book resale price maintenance have been shown not to flow at all. Indeed, the Commission seems to think that price competition is the best way to achieve the distribution of books in line with cultural demands.

2.6 Industrial policy⁵⁹⁴

The Community's industrial policy is largely non-interventionist. Despite this, industrial policy has often been raised in the article 81(3) balance. When this has happened it has been given positive weight. The early cases often involved the restructuring of entire industries.⁵⁹⁵ Industrial policy has also been considered alongside other Treaty objectives as a tool to promote Community industry outside of a general restructuring.⁵⁹⁶ When this has happened, industrial policy has been an important, if not the dominant factor in article 81(3). Section 2.6. briefly examines the industrial policy head before investigating the balance in more detail.

⁵⁹³ See Commission, *Vertical Guidelines*, paragraphs 47, 111 and 112 and the *Vertical Block Exemption Regulation*, recital 10 and article 4(a). Exemption for vertical resale price maintenance is only granted exceptionally, B&C (2001), paragraph 7-077 and Commission decision, *Nathan-Bricolux*, paragraphs 110 and 111.

⁵⁹⁴ For a more detailed analysis of industrial policy within the Community see, Amato (1997); Sauter (1997) and Buigues, Jacquemin and Sapir (1995).

⁵⁹⁵ Restructuring has been dealt with in detail elsewhere and is only referred to in passing below. Those requiring more detail see, Commission decisions, *Synthetic Fibres* and *Stichting Baksteen*, as well as Commission, *RCP 1993*, paragraphs 82, 84, 85(i), 88, 89, 158; European Parliament, *Resolution on the Twenty-fourth Competition Report*, paragraph 15; Bouterse (1994), Chapter 5 and Monti (2002), page 1072.

⁵⁹⁶ Ruth (2004), pages 2 and 3, "...the Community, and especially the Commission, have always pursued, with more or less rigour, a strategic competition policy." See also, pages 7 and 10.

2.6.1 Industrial Policy

Article 157(1) of the Treaty says:

"The Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist. For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at: speeding up the adjustment of industry to structural changes; encouraging an environment favourable to initiative and to the development of undertakings throughout the Community, particularly small and medium-sized undertakings; encouraging an environment favourable to co-operation between undertakings; fostering better exploitation of the industrial potential of policies of innovation, research and technological development."

Community industrial policy is not (any longer⁵⁹⁷) principally⁵⁹⁸ aimed at the creation of 'national' giants. Rather, the Commission seeks to create a favourable business-friendly working environment.⁵⁹⁹ Importantly, article 157(3) of the Treaty (added in 1992) adds:

"This Title shall not provide a basis for the introduction by the Community of any measure which could lead to a distortion of competition."

This is the only time that the Treaty makes such a statement. It is clearly an attempt to rule out the use of industrial policy in the article 81(3) balancing exercise,⁶⁰⁰ although possibly not an article 81(1) balance.⁶⁰¹ The Commission has largely ignored it;⁶⁰² industrial policy still affects the article 81(3) balance, although possibly less than it did before 1992. Whenever this happens, industrial policy has been an important,⁶⁰³ if not the dominant factor⁶⁰⁴ in the article 81(3)

⁵⁹⁷ Amato (1997), pages 44, 45 and 58-64.

⁵⁹⁸ Although the Commission's attitude in this area cannot be described as a pure liberal-market philosophy, see, Marques (2000), pages 49-56 and Chapters 3-5.

⁵⁹⁹ See, COM(90) 556, particularly page 5 and following; COM(93) 700 and Commission, *RCP 1993*, paragraphs 156-161; *RCP 1994*, paragraphs 14 and 17, as well as Monti (2002), page 1072.

⁶⁰⁰ Sauter (1997), page 110.

⁶⁰¹ If industrial policy were included in an article 81(1) balance and industrial policy 'won' then one may conclude that there was not a restriction of competition at all. As a result, Title XVI of the Treaty would not have provided a basis for a measure leading to a distortion (or restriction) of competition. Note however, that when the ECJ balanced under article 81(1) in the *Wouters Case*, it found a restriction of competition, but decided that it was justified and so held that article 81(1) was not breached. The fact that it actually found a restriction of competition in that case may undermine this argument.

⁶⁰² Bourgeois and Demaret (1995), pages 85, 92-95 and 106; Commission, *RCP 1984*, point 42 and *RCP 1993*, paragraph 158. This is ironic. It was the competition services of the Commission that pressed for the provision, Sauter (1997), page 112. Perhaps this indicates the political pressure they are under?

⁶⁰³ Examples include, Commission decisions, *Carbon Gas Technologie*, paragraph 1 of the 81(3) discussion and *BBC/Brown Boveri*, paragraph 23.

⁶⁰⁴ Examples include, Commission decisions, *Optical Fibres*, paragraphs 59-61; *Olivetti/Canon*, paragraph 54; *BDO Binder International*, reported in Commission, *RCP 1991*, page 335; *Philips-Thomson-Sagem*, reported in Commission, *RCP 1993*, paragraph 215; Commission decision, *Exxon/Shell*, paragraph 67; *Lufthansa/SAS*, reported in Commission, *RCP 1996*, pages 120 and 121 and Commission decision, *GEAE/P&W*. Also see, Commission Notice, *GEC-Siemens/Plessey*, paragraphs 20-22 and 27-29.

exemption. It is one of the most important and heavily used objectives in the article 81(3) balance.⁶⁰⁵

The Commission stresses that both efficient markets and innovation are necessary for industrial progress.⁶⁰⁶ As well as contributing to industrial policy, increasing R&D should raise the standard of living and employment.⁶⁰⁷ Having said that, the Commission has made it clear that at a certain point the pursuit of R&D may undermine economic efficiency⁶⁰⁸ and thus industrial policy. The European Parliament and Council also point to a link between improved R&D and environmental protection.⁶⁰⁹

2.6.2 The Balance?

Industrial policy is considered within article 81(3) in the *Matra* Case. This CFI judgment was an appeal from Commission decision, *Ford/ Volkswagen*. This decision, discussed in Chapter Two, referred to an agreement between Ford and Volkswagen to build a manufacturing plant for MPVs in Portugal. Ford was the fifth largest supplier in the Community passenger car market (11.6%), Volkswagen was described as a leading supplier (15.5%). The joint venture would develop, engineer and manufacture the MPV. Ford and Volkswagen would distribute them separately under their own brand names.

The joint venture involved an investment of USD 2.9 billion, should last for about 10 years and would take place on a green-field site in Portugal. The parties sought an individual exemption on the grounds that the MPV market is low volume and neither party had been an important supplier in this market (Ford had about 1% and VW essentially had no share). The market was dominated by Renault (54.7%). The parties stressed that the vehicle would be produced in a new and modern plant and the joint venture would have positive effects on the infrastructure and employment in one of the poorest regions of the Community.

The Commission found a breach of article 81(1) because Ford and VW were important competitors in the European and world car markets and in view, paragraph 19 "...of their financial, technical and research capacities, either company is, in principle, capable of producing a MPV on its own." The Commission also felt that the joint venture would involve a substantial sharing of technical and other know how which could affect their behaviour on

⁶⁰⁵ See, for example, the *Matra* Case, discussed below, and Commission, *RCP 1993*, paragraph 158.

⁶⁰⁶ COM(96) 463, page 8(iii). See also, Commission, *RCP 1991*, paragraphs 47-50. Hildebrand (2002), page 18, says "The crucial and complementary roles of the technological and competition policies are both aimed at supporting the competitiveness of European industry."

⁶⁰⁷ COM(90) 556, pages 3-5. Also see, COM(93) 632, pages 29 and 30 and Commission, *RCP 1997*, page 138.

⁶⁰⁸ See Chapter One.

⁶⁰⁹ See, European Parliament and Council Decision, *review of 'Towards Sustainability'*, recital 20, articles 2, 3(1)(f) and 8.

neighbouring market segments, paragraph 21, although paragraph 38 contradicts this somewhat. This is important. The Commission obviously sees these as serious reductions in economic efficiency both on the relevant market, as well as others, in the long and short term.

The Commission granted an individual exemption. At paragraphs 24 and 25, it emphasised the fact that through co-operation the parties should be able to produce an advanced vehicle designed to meet the requirements of European consumers. Co-operation will also lead to a rationalisation of the manufacturing process, enabling both parties to combine their know how in many areas.

When considering the exemption on appeal, the CFI raised two issues. First, the contention that the agreement would lead to a factory in Portugal which was the "...first application by a European car manufacturer of the enhanced form of manufacturing process recommended in 1990 by the most authoritative researchers in the field of technological development..." The CFI found that, paragraph 109:

"...an optimisation of the manufacturing process of that kind is in conformity with the meaning and purpose of the first of the four conditions laid down by article 85(3) [now 81(3)] of the Treaty."

It is hard, though not impossible, for the CFI to adopt this position unless it reads article 81(3) in terms of *Community* industrial policy, i.e. if it is sufficient that the agreement leads to the improvement of production or distribution in Europe, and/or leads to technical progress here. There was no technical progress on a worldwide scale, as better manufacturing processes already existed outside Europe.

This position is reaffirmed in paragraph 110 of the CFI's decision, in relation to the second point that the agreement leads to technical improvements to the MPV itself. The CFI says that these improvements:

"...must be assessed in relation to the state of development of car construction techniques in Europe when the Decision was adopted."

Once again this seems very much like a European industrial policy argument. The agreement benefits from article 81(3) not because it leads to technical and production improvements *as such*; but because it leads to such improvement *in Europe*. This is particularly important in the context of this thesis. The Commission found, paragraphs 20 and 21 of its decision, that not only would the agreement lead to an extensive exchange and sharing of technical know how but that:

"The development of new models is one of the key elements of competition in the car sector and a determining factor for the success of a manufacturer in the market. Any agreements between competitors likely to restrict this activity have to be regarded as

serious restrictions of competition. The joint development of an MPV by Ford and VW...means that neither...company would have any economic interest in independent activities in this field."

Therefore, not only is industrial policy the dominant, if not only factor,⁶¹⁰ to be considered under article 81(3) of the Treaty; but, the Commission granted an exemption on this ground in the face of serious restrictions of competition, and allocative efficiency in particular. The CFI accepted this. This is despite the direct wording of article 157(3) of the Treaty, see above.

Other decisions make the same point. For example, Commission decision, *BT-MCI*.⁶¹¹ Under the agreement in *BT-MCI*, British Telecom (BT) was due to take a 20% stake in MCI, becoming the largest single shareholder, although it could not gain control. Newco (N) would be created, a joint venture company, to provide enhanced and value-added global telecommunications services to large companies. The parties would contribute their existing non-correspondent international network facilities to N, paragraph 2. N would initially focus on providing enhanced services, including data services, intelligent network services, global outsourcing services etc. These services were to be global in nature, paragraph 6. The Commission found that the current set of national monopolies had not been able to achieve this adequately. Up until then telecom operators had co-operated to link their respective networks, customers were billed separately and in different countries, creating language and other problems, paragraph 7. BT and MCI hoped to take advantage of the liberalisation process and new technology to provide a better service, paragraphs 8-10.

The Commission found that the relevant geographic market was global, paragraph 15. There were a number of competitors, paragraph 17. The buyers are sophisticated and will only switch to N if it is cost-effective; they have a lot of bargaining power, paragraph 18.

The Commission found that both BT and MCI had the financial and technological capacities to enter the relevant market on their own. On top of that, N's creation means that they will probably not develop a competing set of products. The Commission found that: (i) the appointment of BT as exclusive distributor of N within the EEA; (ii) the obligation on the parties to get all global products from N; (iii) the non-compete provision as regards the activities of N; and (iv) the "loss of rights provision" as regards MCI's activities within the EEA meant that the agreement fell within article 81(1) of the Treaty, paragraphs 45-48.

The Commission found that N would provide cost savings which should generate competition between those seeking to supply it basic telecom transmission capacity, paragraph 53. N will

⁶¹⁰ No express efficiency arguments are raised except that production and development costs may fall. Even then no analysis is provided explaining why the reduction in competition caused by the elimination of one competitor will not increase prices.

⁶¹¹ See also, Commission decision, *Atlas*.

create a whole new network, which was considered to be a real advantage over the 'national systems plus' approach used up until then, paragraph 53. The Commission said that the combination of BT and MCI technologies would allow N to offer new services more quickly, cheaply and of a more advanced nature than either parent could offer alone, paragraph 53. In addition, and *as a related consequence*, MCI technology, said to one of the best in the world, would be made available to N's European customers, paragraph 53. This would allow the Community's most important companies to achieve better telecom performance at the international level, which could enable them to better withstand global competition, paragraph 53. The Commission's exemption decision is not limited in time.

It is more difficult to classify the Commission's arguments in this decision. It is a matter of emphasis. Did the Commission look to productive efficiencies and then examine some of their consequences; or, did it develop its industrial policy argument and then try to achieve it any which way? The second suggestion seems more accurate. Why? First, there is not a proper discussion of productive efficiencies and how these will be affected by the lessening of competition in the longer term. There is, debatably, no discussion of dynamic efficiencies at all, although the point that N will be able to create a new kind of network may undermine this point somewhat. Secondly, there is the relevance of the words "...as a related consequence..." These are suspicious and imply, in the context in which they are used, that the argument is used because of its consequence, that is, to get MCI technology in the EU.

This seems important to the Commission for two reasons. First, it will help BT, this is implicit. Secondly, it will help Community businesses "...to better withstand global competition..." Note that it does not say respond to. "Withstand" has a defensive connotation. One might argue that the second point here is an economic efficiency (total welfare) point. Once again this is a matter of emphasis. Yet, the emphasis is on industrial policy *per se*, rather than achieving this through encouraging R&D and other goals through market-based mechanisms. The welfare discussion is non-existent. In any event it is difficult to understand the Commission's logic as N will also be supplying non-Community companies and it is hard to see why the improvement would accrue more strongly to Community undertakings. This is made particularly difficult because the Commission did not split up its arguments into cause (greater competition) and effect (more competitive EU companies). Rather it has mixed everything together, market and industrial policy points, in order to achieve an ultimate goal.

2.6.3 Conclusion of Section 2.6.

It seems that industrial policy was one of, if not, the decisive Commission objectives in *BT-MCI*. This is even clearer in *Matra*.⁶¹² Industrial policy, in the sense it is being used here, conflicts with economic efficiency. The Commission and the CFI were not seeking productive efficiency improvements *per se*. They were encouraging them because of the advantages they would bring, *in Europe*, to European firms.

Where is the balance? In *Ford/ Volkswagen*, and apparently⁶¹³ contrary to the express wording of article 157(3) of the Treaty, the Commission allowed industrial policy to outweigh a serious restriction on competition.⁶¹⁴ Industrial policy must, at times, have a lot of weight in the balance. Indeed, the weight that it has been given is even more spectacular given that, in matters such as these, the pursuit of economic efficiency also has an industrial policy component. At least over the long-term, most economists would agree that the best form of industrial policy is the pursuit of economic efficiency and efficient markets, see Chapter One. The Commission has accepted this;⁶¹⁵ article 157(3) appears to do the same. This is not discussed by either the CFI, or the Commission.

Did they go too far? In order to assess this, one would have to find a suitable common meter. But what is the gain that the Commission and CFI were seeking to achieve in, for example, *Matra*? Not, says the CFI, the 15,000 jobs, so we can exclude them. Volkswagen's experience of using an advanced factory was one of the gains. This will mean more profits for Volkswagen, should they go into the balance? It also means more experience for European employees working in such an advanced factory. Does one price this as the cost of the course they went on to update their knowledge? The lack of clarity of the content of the industrial policy goal makes such questions difficult to answer. And yet they are just the sort of questions that need to be answerable if we are to have a rational policy, see Chapter Eight.

As we will see in Chapter Five, the Commission has also used the efficiency test itself to encourage industrial development. There is a similarity between the cases discussed here and those discussed in Chapter Five. As we saw in *BT-MCI*, the difference is often a matter of

⁶¹² A similar position can be seen in various block exemption regulations. See, for example, Commission, *Specialisation Agreements Block Exemption* and comments in Amato (1997), pages 63 and 64; and, Commission, *Motor Vehicle Block Exemption* and comments in Wesseling (2000), page 40 and Lukoff (1986).

⁶¹³ This argument is not watertight because article 157(3) of the Treaty says that this title, i.e. Title XVI, cannot justify distortions of competition. It does not actually say that distortions of competition cannot be justified for industrial policy reasons. However, such an interpretation would somewhat undermine the purpose of article 157(3).

⁶¹⁴ Commission decision, *Ford/ Volkswagen* may also have been influenced by the employment and economic and social cohesion points mentioned later in the decision, see also, Wesseling (1997), page 39; Faull and Nikpay (1999), paragraph 2.131 and Amato (1997), page 61. However, the CFI did not agree, see paragraphs 105-108 and 139.

⁶¹⁵ See, above, and for example, Commission, *RCP 1991*, point 3 and COM(94) 319, pages 3 and 33.

emphasis. Did the Commission base its decision on economic efficiency grounds or more explicitly on industrial policy grounds? Perhaps we have mis-interpreted the Commission in our reading of this decision? Perhaps these cases are best dealt with in Chapter Five? More clarity is needed in the decision-making practices of both institutions.

2.7 Security of Energy Supply

Security issues have not been raised very often within article 81. In essence, security issues normally either relate to the security of the Community's energy supply, or, to that of a particular Member State.

2.7.1 The Balance?

Sometimes, the protection of the security of supply of certain important goods, should be given a lot of weight in the balance. One example of such a situation is the *International Energy Agency* decisions,⁶¹⁶ discussed in Chapter Two. The facts in brief. The International Energy Agency (IEA) tries to respond to oil supply disruptions by ensuring the availability of oil stocks for use in emergencies, and by restraining demand and allocating available supplies among some 23 countries on an equitable basis according to an allocation process. The oil companies have agreed to co-operate with one another in the framework of the International Energy Programme and in the operation of the IEA's emergency oil allocation system. The Commission found this to be a concerted practice as it had the object and effect of:

"...taking into account and balancing allocation rights and obligations. This means in some cases directing oil to destinations where it would not have gone had the IEA system not been activated."

The Commission added that there might also be an effect on market conditions from the information exchange that the oil companies operate within the framework of the IEA. Despite this, the Commission granted an individual exemption, saying, paragraph 6, that the changes aim at improving the reallocation process and that the concerted practice improves the distribution of goods and promotes technical progress by reducing the inconvenience and sharing the difficulties in the case of supply disruptions. As was made clear in the 1983 decision, this could not be achieved by the market alone.

In times of crisis serious damage could be caused by disruptions to the oil supply. The Commission seems to have weighed the advantages of the market against the need for the security of supply in times of crisis. Security of supply carries a lot of weight in the balance. Sufficient that, admittedly only in times of crisis, it completely outweighs the market mechanism. The system may have an impact outside of times of crisis too. This is another

⁶¹⁶ Commission decisions, *International Energy Agency* (1994) and *International Energy Agency* (1983). See also, Bourgeois and Demaret (1995), page 95.

example of an interest being taken into account by the Commission, and given heavy weight in the balance, without the need for a policy-linking clause.

The Commission is also prepared to consider security of supply in the balance outside of times of emergency. In at least two cases, the Commission gives weight to arguments that the agreements concerned would reduce the Community's dependence on the supply of oil from non-Community sources.

Commission decision, *Carbon Gas Technologie* involved an agreement between three Community undertakings to set up a joint subsidiary, CGT, with one third of the shares each. CGT was there to develop, to an industrial standard, a combined pressure gasification process using run-of-mine coal, which has been summarily upgraded, and to commercially exploit this process. The German companies would make all their current and future know how available to CGT free of charge. There was also a five-year non-compete provision if they left the joint venture, page 17. The Commission said that both clauses restricted competition, page 19.

The Commission conducted an article 81(3) analysis, in the course of which it discussed a number of Treaty objectives, including industrial policy and environmental protection:

"...using the resulting gas in the conversion process of power stations should be more efficient and less harmful to the environment than direct combustion of coal. Mastery of this technology may also open up for that industry in the Community significant marketing opportunities outside the Community. This being so, the competent bodies have repeatedly stressed the need for the Community to concern itself as a matter of urgency with the development of coal liquefaction and gasification processes...The agreement contributes to the attainment of the above objectives."

While these policy considerations were important in this case, the first objective that the Commission discusses, and the one that it seems to give the most weight, was security of supply:

"Since 1973, the importation of crude oil into the Community has, as regards availability and prices, been subject to recurrent or constant pressures. Even so, crude oil still accounts for almost 49% of the Community's primary energy consumption. Under these circumstances, it is essential that the degree of dependence on this source of energy be reduced and the pattern of the Community's energy supplies diversified through the harnessing of alternative energy sources, and in particular those available in the Community itself. In the search for greater diversification and self-sufficiency and hence greater stability of energy supplies in the Community, coal gasification in particular creates favourable conditions through improved exploitation of Community coal deposits."

The Commission acknowledged that each of the parties could have developed the technology alone. However, in an attempt to accelerate the development and production of this technology the Commission allowed short-term gains to prevail over the longer-term benefits of competition, even though competing technologies were being developed world-wide.

The exemption decision is certainly more generous than the position under Commission, *R&D Block Exemption* that followed just two years after the decision. This regulation required discussion of the market shares of the parties and limits on the time of co-operation, under certain conditions, article 3, neither of which are discussed by the Commission here.

The Commission is certainly being generous towards horizontal cartels in Commission decision, *Carbon Gas Technologie*. However, due to the fact that it involved, in part, an R&D agreement, one cannot be certain of the weight given to these security of supply issues. Industrial policy seems to have carried some weight. Furthermore, the Commission obliquely points to dynamic efficiency issues in the decision, see below.⁶¹⁷

What would the Commission do if R&D and Community industrial policy were not at issue? In fact, just such a case has arisen in relation to the consideration of national security issues under article 81(3). Once again this arose in the context of security of supply. The matter is Commission decision, *Jahrhundertvertrag* and *VIK-GVSt*, which was discussed in Chapter Two. This decision involved a set of agreements where German electricity generating utilities and industrial producers of electricity for in-house consumption (auto-generators) agreed to purchase a specific amount of German coal for electricity generation. The agreements essentially form part of an overall plan to support the German coal-mining industry and were promoted by the Federal Ministry for Economic Affairs. The *Jahrhundertvertrag* is only applicable to companies within the former territory of the Federal Republic of Germany before unification, paragraph 1. Two agreements form the basis of the *Jahrhundertvertrag*. Both were concluded in 1980, (i) the Supplementary Agreement on the sale of German coal up to 1995, between the General Association of the German Coalmining Industry (GVSt) and the Association of the German Public Electricity Supply Industry (VDEW) (the *GVSt/VDEW Agreement*) and (ii) the Supplementary Agreement on the sale of German coal to industrial producers of electricity up to 1995, between GVSt and the Association of Industrial Producers of Electricity (VIK) (the *GVSt/VIK Agreement*), paragraph 2.

The GVSt/VDEW Agreement replaced an earlier agreement (1977) between the parties. It lays down the arrangements for German coal-purchasing by the electricity supply companies between 1/1/1981 and 31/12/1995. The companies undertake to purchase and supply a fixed amount of coal, broken down into 5 year time frames. These commitments can be transferred to a limited extent, paragraphs 5 and 6. Prices are fixed by the Federal Minister for Economic Affairs, paragraph 7. The GVSt/VIK Agreement also replaced an earlier agreement (1977) between the parties. The parties agree (and did) to prevail upon their members to conclude individual contracts on coal procurement up to 31/12/1995, paragraph 8. There is an annual

⁶¹⁷ The Commission adopted a similar position in Commission decision, *BBC/Brown Boveri*, paragraph 23.

average delivery amount provided for in the agreement and individual supply agreements were concluded on the basis of these amounts, paragraph 9. The price clause is similar to the GVSt/VDEW Agreement, paragraph 10.

The Commission noted that coal production in Germany had fallen over the last few decades and that price levels were a good deal higher than on the world market, paragraph 12. This meant that German coal needed state aids, paragraph 15.

The Commission found two restrictions of competition in the VDEW agreement. First, it committed the parties to long term purchases of German coal. The Commission found that the arrangement was exclusive, restricting competition between "...the electricity supply companies for primary energy sources." This means they have jointly deprived themselves of using other coal or other sources of power e.g. nuclear. Secondly, the purchasing commitment also means that to the extent that electricity is generated from the coal so purchased electricity imports from other member states are precluded, paragraph 24. The Commission also appears to find a restriction of competition in the GVSt/VIK Agreement, but it is not clear why, paragraph 27.

Nevertheless, the Commission exempted both agreements. They improve electricity generation and coal production as they provide certainty. Electricity cannot be stored so production and demand must be in constant equilibrium. Therefore, it is particularly important to safeguard the procurement of primary energy resources. The agreements do this for coal. "The supplementary agreements thus promote security of energy in the Federal Republic of Germany.", paragraph 31, i.e. national security.

2.7.2 Conclusion of Section 2.7.

Commission decision, *Jahrhundertvertrag* and *VIK-GVSt* is interesting for a number of reasons. First, a Member State interest, as opposed to a Community interest, is taken into account in article 81.⁶¹⁸ Secondly, the Commission's argument is strange. While it might be true to say that long term contracts were needed at this time of instability, it is hard to believe as these contracts had been in place since 1977 (and there is no mention of other Member States using them). Stability of electricity supply could just as well been achieved through the purchase of non-German coal. Thirdly, the political nature of this case should not be underestimated. The German government was involved to a very high degree. This seems less a case of preserving electricity supply than protecting German mines and employment.⁶¹⁹

⁶¹⁸ Chapter Seven discusses this in more detail.

⁶¹⁹ GVSt argued in this matter that the agreements were necessary as part of Germany's strategy for safeguarding energy, preserving a national source of supply independent of the international commodity markets; and that they were necessary for the prevention of social strife, speeding up the loss of jobs in this industry "...might result in

Nevertheless, just imagine that, on the facts, the Commission is right and these agreements did promote the security of energy in Germany, what weight has the Commission given this criterion in the balance? It has been given enormous weight. Agreements theoretically based on this objective have been allowed to undermine both economic efficiency and market integration (by sealing off the German market as they reduce the demand for electricity generated outside Germany, even that produced in other Member States). Perhaps the Commission did not base its decision exclusively on national security considerations. However, the fact that it is prepared to give that impression implies that it is comfortable with this balance. This means that it could decide this way again in other decisions too.

Third, from where did the Commission introduce this interest into the balance? It is not even referred to in the Treaty; although it might be considered necessary to achieve the article 2 balance. There are no policy-linking clauses, no demands for a high or low level of consideration. It has come from nowhere and is allowed to displace fundamental article 81 objectives, economic efficiency and market integration.⁶²⁰

The Community recognises the importance of a secure supply of energy.⁶²¹ The Commission is prepared to distort competition to ensure this security in times of need, but also to encourage technologies that are likely to reduce the reliance of Europeans on oil imports. Even without the associated industrial policy and R&D considerations, the Commission may, in certain circumstances, undermine important Treaty objectives, such as economic efficiency and market integration, in order to achieve this end in the future. Once again, clarity could have been enhanced by the use of a clear theoretical framework for the balancing.

2.8 Conclusion of Section 2

Article 81(3) of the Treaty is an appropriate place to weigh competition considerations against other public policy objectives. Section 2 illustrated this process with reference to many of these objectives. This is not a closed list, indeed Chapter Two refers to many more.

Unsurprisingly, many of Section 2's observations were similar to those in Chapter Three. The balancing process is, as yet, unrefined. Many of the objectives considered in article 81 are not clearly defined.⁶²² Nor is there a proper analysis of their weight in the specific case and whether the achievement of one aim might additionally contribute to another relevant goal (which should

tensions in the regions concerned that would be difficult to control." paragraph 19. Although these social arguments were not raised in the decision, they may have been decisive in the political importance of this case for Germany.

⁶²⁰ Although, a combination of political and economic factors have pushed the Commission to allow for the protection of national interests in other periods too, see Wesseling (2000), pages 36-41.

⁶²¹ See, COM(95) 682, section 4.3.1.

⁶²² Bourgeois and Demaret (1995), pages 113 and 114.

also affect the objective's weight). In relation to environmental protection, the Commission has begun to explain how to assess an agreement's costs and benefits. There is a long way to go. Legal certainty is promoted by explaining what you consider and how you consider it, Chapter Eight provides a framework for this.

The Commission is becoming increasingly open and confident in conducting what is, in effect, a political balancing act, under article 81(3) of the Treaty. However, it is more difficult to explain why the Commission has become more confident about using these other Treaty objectives. Also, why it is more prepared to rely on some objectives rather than others?

Many policy objectives have had a significant impact on the balance. Cultural considerations undermined price competition to a certain degree; the need to maintain the security of the energy supply seemed even more intrusive. Consumer protection and industrial policy both reduced economic efficiency in the short and medium term, undermining the fundamental parameters of competition in some industries. This has happened in relation to national as well as Community interests.

Most objectives have only been given positive weight in the balance. However, as the Commission becomes more open about the balance itself, there is some evidence that it is weighing a multiplicity of factors, some of which it gives positive and some of which have negative weight; see, for example, both market integration and consumer protection. Perhaps this is the birth of a full-blown public interest assessment, see Chapter Seven?

There is some evidence that the balance is changing over time, see market integration, environmental protection and consumer protection. This is understandable as the Treaty's optimal balance is changing too. However, until the objectives are properly defined and their weight correctly apportioned, then these, quite proper, changes merely increase the test's lack of transparency.

There is some evidence that the balance may change between article 81(1) and (3). Certain objectives, such as economic efficiency, seem to be given more weight in the later provision. Although some explanation for this is given in *Métropole télévision* this cannot be the whole story, as the effect existed before then too. That said, some objectives have been given a lot of weight in article 81(1) as well. In light of Section 3 it may be better not to generalise conclusions about policy objective's actual weight in relation to article 81(3)'s balance here. One thing is certain though. Absolute *per se* rules, while acceptable under article 81(1), cannot be tolerated under article 81(3) of the Treaty.

The final point relates to the distribution of power in the balancing process. The Commission is completely in charge, even after 1 May 2004, see Chapter Eight. It has been sensitive when

considering certain Member State objectives within article 81(3). Yet, the Council and the European Parliament remained impotent in their attempts to force the Commission to change the weight it ascribed to cultural policy in the article 81(3) balance. Their efforts are even less likely to be rewarded since the Commission's 1997 study. As a result, the Council and the Parliament are considering using other policy tools to promote cultural values, which may be more efficient, see Chapter One. Although we commend the Commission's insistence on evidence to support the cultural claim, Chapter Seven advocates a more sensitive stance in relation to diagonal conflicts of this type.

3. WHAT IS THE BALANCE?

We have established that there is some kind of balance taking place. But, this is not enough. What is the article 81(3) balance in each area? Due to a lack of clarity in the decision-making process, this is hard to assess. The failure of the Commission to adopt an explicit and rational balancing mechanism undermines the process and leads to ad hoc decision-making. The lack of control over this process by the Community Courts means that this is unlikely to be checked soon.

In some cases the Commission has explicitly said where the balance is. However, it is rarely so clear. We have only been able to find examples of explicit balancing in the following areas:

- *market integration/ economic efficiency*, in relation to absolute territorial protection. Here the balance is unsatisfactory. Although there are clear statements on where the balance is, they are not justified by explanations about why it is there and indeed whether there is a conflict at all;
- the Commission also clearly defined the limits of the balance in relation to *cultural* criteria. The Commission has never implemented this balance in the caselaw however;
- the Commission provided examples of certain restrictions on competition with *environmental benefits* that would not be tolerated. In later cases the Commission ignored the limits it first imposed. We do not know why. Has environmental protection some special status? Were the cases we discussed merely exceptions to the general rule, which remains unchanged? There has been no open discussion shedding light on this area.

So we turn to the process of induction from the caselaw. In order for this approach to provide clarity we need cases on both sides of the balance, i.e. cases where, for example, environmental protection outweighs economic efficiency and cases where economic efficiency outweighs environmental protection. We can then deduce that the balance is somewhere between these extremes. In theory, with time, cases should fill the gaps building up a detailed picture of the

balance. This has not happened either. Implicit balancing is certainly more common than explicit balancing. But, thus far, there are not enough cases to generate a clear idea of where the balance lies. In part, this is due to the lack of clear reasoning in the decisions. More importantly, it is due to the complete absence of any cases where these non-economic Treaty objectives have 'lost', see below.

What does the doctrine say?⁶²³ Monti (2002) argues that there are three 'core' policies, economic freedom, economic efficiency and market integration. He describes how they interact, section 2.4. He goes on to discuss other policies that are also considered in article 81(3) of the Treaty, making it clear that he does not provide an exhaustive list. He looks at employment, industrial policy, environmental policy and consumer protection. Monti concludes that, pages 1077 and 1078:

"The decisions show that there is a consistent approach when non-competition factors are analysed: they are *combined* with the agreement's contribution to the core values in article 81 [economic freedom, economic efficiency and market integration]."⁶²⁴

In the next sentence Monti refines this point. He says, page 1078:

"The core values are never undermined, but on the other hand a reduction in competition is tolerated when this contributes to the achievement of a Community objective, provided that the agreement also improves *efficiency*. [my emphasis]"⁶²⁵

Monti seeks justification for the special status of the core policies in the caselaw. He argues that non-core objectives are only examined if efficiencies are first established, pages 1071 and 1072. But where is this justified? Monti provides no evidence to support this assertion when discussing employment. He does not raise the point in relation to environmental policy, which he believes is becoming more like a core policy; and his discussion of consumer policy focuses on other issues. In relation to industrial policy he relies on four Commission matters to support him. They are *Optical Fibres*, *Olivetti/ Canon*, *GEC-Siemens/ Plessey* and *Continental/*

⁶²³ The limits of the balance are rarely discussed in the English literature, Monti (2002), page 1058. Nevertheless, views similar to those proposed by him are often accepted uncritically, see, for example, Ariño (2004), page 13; Bouterse (1994), page 104. Advocate-General Verloren Van Themaat, seems to adopt a similar position to Monti in the *VBVB/VBBB Case*, page 89, (although he may merely be referring to the subjective motivations of the parties here) but does not explain why the Treaty or the caselaw supports his conclusions.

⁶²⁴ See also Faull & Nikpay (1999), paragraph 2.15 "...an anti-competitive agreement should not be allowed on environmental grounds alone." As Monti believes that economic freedom is considered in the article 81(1) analysis, he probably means that the first provision of article 81(3) demands that the agreement enhance either economic efficiency or market integration. This is unclear however, see below, where he only refers to economic efficiency considerations.

⁶²⁵ This more restrictive reading is also in line with a Monti makes earlier in the same paper, where he argues that in the language of 'neo-classical economics' article 81(3)'s first condition's wording "...refers to allocative, productive or dynamic efficiencies.", Monti (2002), page 1063.

Michelin.⁶²⁶ *Optical Fibres, Olivetti/ Canon or GEC-Siemens/ Plessey* do not imply that efficiency requirements are needed. Although present in those cases the Commission does not say that without efficiency savings the parties would have lost. At paragraph 21 of its *Continental/ Michelin* decision, the Commission found that it could not rely on Commission, *R&D Block Exemption* in the case at hand and, citing recital 10 of that block exemption, said:

"The Commission must therefore examine whether the agreement may be granted an exemption by individual decision, such a decision having to take account *not only of the criteria specified in article 85(3) [now article 81(3)], but also in particular of world competition and the particular circumstances prevailing in the manufacture of high-technology products...*" [my emphasis]

Does this support his case? Monti's argument focuses on the part in italics. He relies on the fact that the Commission seems to say that one looks first at the article 81(3) criteria. One does not consider industrial policy at this stage. If the agreement fulfils article 81(3), then one can look at additional criteria, such as industrial policy, page 1073. Alternatively, and this is where we disagree, the Commission may cite industrial policy (taking account of world competition and the other factors mentioned in the underlined segment) as a particular kind of objective that can go into the article 81(3) balance. When the Commission is saying that one does not 'only take account' of the criteria specified in article 81(3) of the Treaty, it may mean that one can take account of other objectives within the balance, even if they are not specifically mentioned there. The Commission made the same point in the *Matra Case*, for example.⁶²⁷

In order for Monti's reading of this passage to be correct, the agreement must fulfil the article 81(3) criteria first. Only then can industrial policy criteria be examined. However, if article 81(3) has been fulfilled, then there is no reason to look any further. Or, in the words of the Commission:

"The four conditions of article 81(3) are...exhaustive. When they are met the exception is applicable and may not be made dependant on any other condition."⁶²⁸

This goes against Monti.⁶²⁹

Persuading the Commission that an exemption should be provided is probably easier if there are efficiency reasons in favour of the agreement. However, we have seen cases where the Commission granted exemptions based on, in the words of Monti, non-core Treaty objectives,

⁶²⁶ Commission decisions, *Optical Fibres; Olivetti/ Canon* and *Continental/ Michelin*. Also see, Commission Notice, *GEC-Siemens/ Plessey*.

⁶²⁷ See, the *Matra Case*, paragraph 96 "...it is possible to take into account, as regards the contribution to economic and technical progress, factors other than those expressly mentioned in those provisions. They include, for example, the maintenance of employment..."

⁶²⁸ Commission, *Article 81(3) Guidelines*, paragraph 42. See also, Chapter Seven.

⁶²⁹ Note that Commission, *Article 81(3) Guidelines* were released after the publication of Monti (2002).

where economic efficiency (let alone other core values) was not even discussed, for example culture,⁶³⁰ industrial policy⁶³¹ and national security.⁶³² This was sometimes even the case when the Commission thought that economic efficiency would be undermined, for example, consumer protection.⁶³³

There is no evidence that the core values must be combined with the other Treaty objectives. Nor has Monti adequately demonstrated that the core values cannot be undermined by a 'non-core' value. There are many examples of 'non-core' policies justifying exemption on their own. One can even go further. In most cases it is not yet possible to see a balance at all.⁶³⁴ We saw above that where the Commission is going to rely on an implicit balance there have to be sufficient cases on both sides of the balance to allow us to discern where the balance is. This is not yet possible for a very surprising reason.

To our knowledge there are no Commission decisions⁶³⁵ where non economic efficiency objectives have been raised,⁶³⁶ and where the Commission accepted that they were in fact relevant, where these objectives did not win, i.e. tilt the balance in their favour.⁶³⁷ This is true in relation to all the objectives that we have investigated; see, for example, environmental protection,⁶³⁸ culture,⁶³⁹ public health,⁶⁴⁰ consumer protection⁶⁴¹ and industrial policy.⁶⁴²

⁶³⁰ Where the Commission is prepared to allow vertical resale price maintenance, not on efficiency grounds, these are never discussed as a benefit, but as a way of reconciling cultural concerns with the competition rules, Commission, *RCP 1993*, paragraph 177.

⁶³¹ Industrial policy considerations are allowed to outweigh a serious restriction of competition, the *Matra Case*.

⁶³² Where the Commission seemed prepared to allow national security considerations to justify what certainly appear to be anti-competitive agreements, Commission decision, *Jahrhundertvertrag* and *VIK-GVSt*.

⁶³³ Exemption would likely have been refused on consumer protection grounds, even for an agreement that would have had positive economic efficiency effects, Commission decision, *Grundig's EC distribution system*.

⁶³⁴ Rosenthal had a similar view some 10 years ago, see Rosenthal (1990), page 298. For a similar, and more recent view, in the area of environmental protection, see London (2003), page 277; although note her attempts at divining what the rules are for recycling schemes, at page 276.

⁶³⁵ There are the Commission's express statements on these issues, as illustrated above. However, these are obviously non-binding and, in practice, the Commission does not follow them itself, see above.

⁶³⁶ A possible question mark must be raised here in respect of market integration. This is because it is unclear what this policy means, see Chapters One and Three. Under certain interpretations, however, one can also say that market integration always wins too.

⁶³⁷ It may be that, in some cases, the Commission forced the parties to renegotiate in the notification process, see, for example, Korah (1987). See below for notes on some cases where there was a clear discussion of the Commission's reasons for such changes. Also note, that the discussion here only considers article 81(3)'s first test, exemption has been prohibited under article 81(3)'s other three tests in relation to non-economic objectives.

⁶³⁸ For example, the Commission insisted on changes in a number of agreements. In Commission decision, *Ansaac*, the Commission refused to allow an exemption based on environmental arguments. However, this was because, paragraph 23 "Those arguments have no bearing, however, on the marketing of the product, with which alone Ansaac's proposals are concerned.", i.e. they were irrelevant. The Commission also insisted on changes in Commission decision, *Assurpol*, paragraph 1. The reasons for these changes are not explained in the decision. *Spa Monopole/GDB*, reported in Commission, *RCP 1993*, paragraph 240, but here the Commission's reasoning seems to

This finding is completely counter-intuitive. One would have thought that these objectives would only have been raised in weak cases where the parties had no better arguments.⁶⁴³

have related to an elimination of competition, rather than the wrong balance. In Commission decision, *Exxon/Shell*, paragraphs 37-39, the Commission insisted on changes to the agreements but this was because the restrictions were not indispensable to achieve the article 81(3) objectives. In Commission decision *Eco-Emballages*, paragraphs 60-62, the Commission insisted on changes but did not explain why these clauses would not have been exempted under article 81(3) of the Treaty.

⁶³⁹ In relation to culture, the *VBVB and VBBB Case*, paragraphs 54-60, the ECJ merely found that the applicants had not shown on the merits that their agreement would contribute to technical or economic progress under article 81(3). The underlying Commission decision, *Re VBBB and VBVB Agreement*, found the same, paragraphs 48-53. For a contrary opinion to the one offered here see, Loman, Mortelmans, Post and Watson (1992), page 105 and, possibly, Bouterse (1994), page 104, which suggest that cultural arguments did not 'win' in the balance. Neither source explains why they believe this. In the *Leclerc Case*, the article 81 issue was not relevant because there was not an affect on trade between Member States, paragraph 20. In Commission decision, *Publishers Association - Net Book Agreement*, paragraph 70 and following and the subsequent appeals, Case T-66/89. *Publishers Association v. Commission* [1992], paragraphs 71-118 and Case C-360/92P *Publishers Association v. Commission* [1995], paragraphs 35-49, exemption was not granted because the restrictions were not indispensable. The Commission insisted on changes to the agreement in Commission decision, *EBU/ Eurovision System*, paragraphs 41-44, but the reason for this is not clear in the decision. In *KVB - Hanselsreglement*, the Commission concluded that there was no effect on inter State trade, Press Release IP/99/668. In *German/ Austrian Book Arrangements: Sammelrevers* the agreement did not apply to inter State trade, Press Release, IP/02/461. Finally, in the *Échirolles Case*, the article 81 issue was not relevant because there was held not to be an affect on trade between Member States, paragraph 24.

⁶⁴⁰ In relation to public health, some exemptions have been refused. In Commission decision, *Grohe's distribution system*, refusal was based on indispensability grounds, paragraph 20 and following, see also Commission decision, *Ideal-Standard's distribution system*, paragraph 19 and following. The Commission also insisted upon certain amendments in Commission decision, *Pasteur Mérieux-Merck*, paragraph 3. These appear to have been in order to restore competition to an appropriate level, see for example, paragraphs 102-113, but I question whether this decision was really about public health anyway. In many ways it looks like a pure economic analysis. The Commission also insisted that the duration of the co-operation be shortened in Commission decision, *Asahi/Saint-Gobain*, paragraphs 12, 30 and 31, but this was on indispensability grounds.

⁶⁴¹ Does the ECJ undermine this argument when, in Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck v. Commission* [1980], paragraphs 185, it says "...it may be seriously doubted whether the benefits in relation to distribution arising from the recommendation are likely sufficiently to compensate for the stringent restrictions which it imposes on competition in respect of sales terms allowed the trade to justify the conclusion that it contributes to improving the distribution of cigarettes within the meaning of article 85(3) [now article 81(3)]."? It does not, for two reasons. First, at the beginning of paragraph 185 the ECJ explains that this conclusion came as a result of its previous discussion. This discussion related to the necessity of the restrictions for achieving the desired social aim, article 81(3)(a). At paragraph 184 the ECJ found that the restrictions were not necessary to achieve the social aim. As a result, it is not surprising that the social aims were not 'likely sufficiently to compensate for the stringent restrictions'. In other words, the ECJ's comments probably do not relate to the optimal balance. Secondly, the ECJ makes it clear at paragraph 186 that its comments are obiter dicta because the restrictions also eliminated competition.

⁶⁴² In relation to industrial policy, Commission decision, *Optical Fibres*, paragraphs 2-4, 57, 58 and 61-72, the Commission insisted on an amendment to the agreement as originally notified, but this seems to have been because the restrictions were not deemed indispensable. The fact that Corning was a US entity may have also had an impact on the Commission. In Commission decision, *Banque Nationale de Paris/ Dresdner Bank*, paragraph 15, the Commission insisted on an amendment to the agreement, but that seems to have been because they were worried about eliminating potential competition.

⁶⁴³ "I, for one, protest...against arguing too strongly upon public policy...It is never argued at all but when other points fail.", Burrough MJ, *Richardson v. Mellish*, 130 Eng. Rep 294, 303.

However, such a view underestimates the value of these other objectives in the Treaty system as a whole and thus their weight in the balance.

For this reason, the caselaw and decision-making practice of the Commission and the Community Courts do not seem to support Monti. However, there are two more general criticisms of his view, based on principle. This is related to Monti's justification for treating economic freedom, efficiency and market integration as core article 81 aims.

Monti argues that because core factors are directly referred to in the text of article 81 (competition and efficiency) or are central to the Community's task (market integration) then, *prima facie*, they should have more weight than other factors, page 1070. Is this right? No.⁶⁴⁴

First, article 81 (nor the Treaty as a whole) does not expressly refer to either economic freedom or efficiency. There is still enormous debate about what a restriction on competition actually is, see Chapter Six. Article 81(3)'s first condition does not expressly refer to economic efficiency either.⁶⁴⁵ Those drafting the Treaty could have been specific and used the terms economic efficiency and freedom if they had agreed that they should have been considered in specific paragraphs. They did not. However, even if 'economic progress' were read as economic efficiency, Monti's point is undermined because "...improving the production or distribution of goods or...promoting technical or economic progress..." contains four separate heads. It is clear from the Treaty language that any one of these is sufficient⁶⁴⁶ to justify exemption. As one of the heads makes specific reference to 'economic progress' there is an implication that the other heads refer to something different. This is particularly the case where these heads are interpreted broadly, as they are, see Chapter Two.⁶⁴⁷ In response to this, Monti might say that all four of article 81(3)'s first condition's heads refer to economic efficiency.⁶⁴⁸ However, it is far from clear that these heads only refer to economic efficiency, Chapter Two. To the extent that that

⁶⁴⁴ Faull and Nikpay (1999), paragraph 2.15, justify their opinion that environmental considerations alone cannot outweigh a restriction of competition by saying that the Treaty does not promote environmental protection over competition and because there are other ways of protecting the environment. In relation to the first point, Chapter Two argued there was no *permanent* priority of any Treaty objective over any other. That does not mean that *sometimes* one will triumph over another. If this were never the case then we could not resolve conflicts between objectives. If correct, this undermines their argument. As regards their second point, the Treaty's structure and the policy-linking clauses indicate that its drafters did not follow this logic. The Community Courts have not mentioned such a criterion to my knowledge. Chapter Seven discusses how one might be introduced.

⁶⁴⁵ Bouterse (1994), pages 127 and 128.

⁶⁴⁶ If there is sufficient quantity to outweigh the article 81(1) restriction and the other three article 81(3) conditions are fulfilled.

⁶⁴⁷ One might add that if objectives such as market integration and economic efficiency are core values, why does the Treaty, in Monti's view, relegate them to mere exemption status? Monti believes that they are irrelevant under article 81(1) of the Treaty. Furthermore, unless one considers why certain Treaty objectives are pursued then one cannot assess their weight in the balance. The justifications for market integration have changed. Its centrality to the Community's task was altered in the transition from an economic to a broader Treaty framework, see Chapter One.

⁶⁴⁸ See the reference above to Monti (2002), page 1063.

they do not refer exclusively to economic efficiency, see above, it is hard to understand how they can be read as demanding its presence in every case.

In any event, and this is the most important point, strict reliance on the wording of article 81 is not in line with the Community Courts' method of Treaty interpretation. Monti understands this. He believes that the approach he advocates:

"...respects the primacy of the core aims of article 81 while giving appropriate weight to the significance of other Community policies."⁶⁴⁹

One might question this. Before being exempted under article 81(3), agreements must fulfil three other tests. These are designed to ensure that sufficient weight is given to competition and consumer interests. Adding an additional requirement into article 81(3)'s first condition seems excessive. It also undermines article 81(3)'s structure somewhat, due to the presence of these other tests. Furthermore, Monti's position does not properly reflect the teleological method of interpretation. As Chapter Two argued, instead of placing emphasis on a provision's actual wording, stress is normally placed upon its structure and place within the Treaty hierarchy. Provisions must be interpreted in light of the Treaty as a whole. This is different from Monti's insistence on the primacy of article 81's core aims. There is little evidence to show that the Treaty *permanently* prioritises⁶⁵⁰ any objectives in the way Monti advocates, see Chapter Two.⁶⁵¹

The Community Courts have never held that article 81(3)'s first condition demands that some economic efficiency be present. Quite the contrary. As we saw in Chapter Two, the CFI has said many public interest objectives can be considered there. As we saw, in cases such as the *Matra Case*, the CFI has probably based its assessment entirely on industrial policy grounds.

Market integration, economic freedom and economic efficiency are important Community objectives. They are key in Community competition law and are referred to in the majority of cases. The Treaty does not *permanently* prioritise other non-economic objectives over these values,⁶⁵² even where there is a policy-linking clause.⁶⁵³ That does not mean that non-economic policy objectives cannot *occasionally* override these 'core' objectives. The Community Courts

⁶⁴⁹ Monti (2002), page 1071.

⁶⁵⁰ Although Monti's core objectives are of particular importance in the Treaty hierarchy of values in most cases.

⁶⁵¹ This is not to argue that the competition provisions do not emphasise, for example, economic efficiency more than, for example, the Treaty provisions relating to environmental protection (which emphasise environmental protection more than the competition provisions). Indeed, I argue for just such an emphasis in Chapter Six. However, this is different from arguing, as Monti does, that certain objectives *permanently* trump other objectives within article 81.

⁶⁵² There are some limited exceptions to this broad statement, see Chapter Two.

⁶⁵³ In relation to environmental protection, for example, see Jans (2000), pages 18 and 19 and Krämer (2000), page 15.

read the Treaty holistically. They interpret each Treaty article in light of the Treaty as a whole. This is due to the structure of the Treaty itself, as well as the presence of several policy-linking clauses, see Chapter Two. This understanding of the Treaty, which is dominant in Community law, is incompatible with Monti's view that certain core values *always* trump non-core values, and can *never* be trumped by them (unless the non-core value is accompanied by another core value). The Treaty as a whole does not prioritise these three objectives (or any others) to the extent that Monti suggests.⁶⁵⁴ Nor do the Community Courts' caselaw⁶⁵⁵ or the Commission's decisions, see above. Politically it is inconceivable that the 'core' objectives could always ride roughshod over everything else, see Chapter One. The emphasis in the Community Courts' caselaw that the context must be taken into account in each case makes it almost impossible to permanently prioritise these three objectives in the way Monti suggests. Why? There are times when consumer protection, environmental protection or the security of the energy supply, for example, are more important than economic efficiency. We have seen examples of this above.

To recap, no objectives can permanently trump other relevant objectives. Outside of this extreme, the Treaty, Community Courts' caselaw and Commission decisions provide little help about where the balance will normally lie (because there are no decisions where non-economic objectives are 'beaten'). What factors are important when deciding whether an objective will justify exemption? This is not at all clear. Those drafting the Treaty tried to give some guidance by including certain objectives within articles 2 and 3. They also inserted a number of policy linking clauses into the Treaty. Within some of those they added that 'a high level of protection' was to be achieved, in others they did not. None of these distinctions are reflected in the caselaw, thus far.

Environmental protection must be given a high level of protection and has not unambiguously outweighed economic efficiency in a decision to date. Consumer protection need not be achieved to a high level and yet it has outweighed economic efficiency too. Furthermore, the Treaty specifically states that Title XVI, *Industrial Policy*, should not provide a basis for distorting competition. And yet, industrial policy is one of the objectives that appears most regularly in article 81(3) discussions. Another strong article 81 objective, security of energy

⁶⁵⁴ Amato argues that the Maastricht Treaty affirms competition as an autonomous and fundamental principle, Amato (1997), page 45. Perhaps, but as the ECJ explained in the *Échirolles Case*, see Chapter Two, this does not impose unconditional obligations on Member States, nor we argued there, on the Community as a whole.

⁶⁵⁵ When discussing the *Matra Case*, for example, Amato says "Over and above the substance of the decision, then, the principles of argument that result show surprising permeability of the antitrust principles, which are hybridised and weakened by the joint presence of industrial policy and social cohesion objectives. The original subsidiarity of the competition principle in relation to other principles laid down by the Treaty thus displays continuing vitality that goes well beyond the capacity for these principles to act as a merely external limit, going instead as far as corroding the sense and logic of the antitrust machinery from within.", Amato (1997), page 62, see also page 114. Also note, Jebson and Stevens (1995-6), page 513, "The underlying assumptions of EU competition law do not make efficiency the sole, or even principal, criterion." Also see Chapter Two.

supply, barely features in the Treaty and has no policy-linking clause at all. Nor, does the fact that certain Treaty objectives are areas of exclusive Member State competence seem to have made the Commission 'more generous' about weighing these issues in the balance. Indeed, the only clear constant seems to be that over time the Commission becomes increasingly bold about relying on these 'non-economic' objectives.

So what of the future? A pattern is evolving. First, the Commission introduces an objective in a comfort letter, reporting it in its annual *Reports on Competition Policy*. Then it introduces it into a decision, but opaquely and in addition to other, well-established objectives. Then it appears on its own, but the decision is vague, giving the impression that it may have been decided on other grounds too. Finally, it stands alone.

The Commission should take account of the various Treaty objectives in the article 81(3) balance in light of the importance given to these objectives in the Treaty. Objectives like environmental protection should be given a high weight in the balance, objectives like culture, should be given less weight. Those amending the Treaty could give the Commission more help in this regard. They could define the weight to be given to economic efficiency, for example, as well as defining the non-economic objectives more clearly. They could also explain why certain objectives are being pursued, such as market integration. This would help establish when conflicts occur. Chapter Eight discusses this in more detail.

The result of these suggestions may be to achieve the balance that Monti suggests. One cannot be sure until the greater transparency advocated above has been achieved. It is likely, however, that the non-core values should be given more weight than he suggests. It is implausible that, wherever the balance is finally set, there will be no exceptions to the general rule under the exigencies of a specific case.

Non-economic Treaty objectives are relevant in article 81 analysis. As time goes on the Commission and Member States' authorities will become more accustomed to relying on these objectives. This does not mean that these objectives will always win. Time will teach the decision-makers to be more thorough in their balancing analysis, see Chapter Eight. They will likely take more account of the Treaty's wording, see Chapters Seven and Eight. It may be that this process will be speeded up by judicial review, increasingly likely in the wake of 1 May 2004. In this way we will see a true balance emerging. One that is clear, not because balancing is easy, but because the foundations of this balance will have been exposed to the light.⁶⁵⁶

⁶⁵⁶ Mortelmans (2001), page 648, also criticises the Commission for failing to provide sufficient help in how to take account of these non-economic objectives.

4. CONCLUSION OF CHAPTER FOUR

The Commission employs non-economic objectives (both Community and Member State interests) within article 81(3) of the Treaty. These objectives have been used alone, as well as in combination with other objectives (both economic and non-economic). Sometimes they have had a decisive impact on the article 81(3) balance.

Having said that, many of the problems related to the balancing process, as highlighted in Chapter Three, also apply in relation to article 81(3) of the Treaty. It may be helpful to list some general points that have arisen as a result of Chapter Four's discussion:

- The content of each objective must be clearly stated, as well as why it is being pursued;
- Which objectives can be balanced within article 81(3), does this include Member State, as well as Community, objectives?
- How can one assess the weights of the different objectives in the balance? What is the effect/ relevance of the policy-linking clauses and the 'high' appellation, in relation to this?
- When should balancing take place in article 81(3), as opposed to article 81(1) of the Treaty?
- Is the weight given to the relevant objectives different in article 81(1) and (3), if so, when and why?
- Is there a full-blown public interest balance within article 81(3) of the Treaty, and, if so, what is the specific mechanism for conducting this?
- Are absolute per se rules appropriate within article 81(3) of the Treaty?

So far, Part B has focused on mere-balancing within article 81 of the Treaty. Chapter Five now examines the second method of balancing used in article 81 of the Treaty, market-balancing.

CHAPTER FIVE: HOW IS THE BALANCE IMPLEMENTED? - MARKET-BALANCING

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| 1. | Introduction |
| 2. | Three 'Components' of the Economic Efficiency Analysis |
| 2.1. | Consumer welfare (or producer welfare?) |
| 2.2. | Productive and dynamic efficiencies (at the expense of allocative efficiencies?) |
| 2.3. | Total welfare? |
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| 3. | Market Over mere-balancing |
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1. INTRODUCTION

Chapters Three and Four dealt with mere-balancing in article 81(1) and (3), respectively. mere-balancing operates *outside* of the market mechanism. We assess economic efficiency and then balance it against other relevant objectives. Chapter Five looks at a different mechanism, market-balancing. Under market-balancing one weighs some objectives *within* the economic efficiency test itself.

Chapter Five has two aims. First, to illustrate how the Commission balances (or could balance) different objectives within its economic efficiency analysis.⁶⁵⁷ Economic efficiency is not a value neutral concept, see Chapter One, and Section 2 highlights three 'components' of the economic efficiency analysis. Chapter Five's second aim is to ask whether the Commission (and other decision-makers) should use mere or market-balancing for incorporating non-economic objectives within article 81, Section 3. Section 4 concludes.

2. THREE 'COMPONENTS' OF THE ECONOMIC EFFICIENCY ANALYSIS

Section 2 highlights three 'components' of the economic efficiency analysis. There are different kinds of welfare, producer welfare, consumer welfare and total welfare, see Chapter One. Focusing on the former, may aid industrial policy goals; while, consumer welfare promotes consumer protection. Section 2.1. discusses this issue in relation to Community competition law. The Commission normally focuses on consumer welfare. However, sometimes, where there are important gains to Community producers, especially those in difficulty, it pays less attention to this concept.

Then we discuss the Commission's emphasis on productive and dynamic efficiencies, rather than short term allocative ones, Section 2.2. This approach emphasises R&D. R&D is not an end in itself, but rather a conduit through which the Community can promote its industrial policy, employment and even environmental goals, see Chapter One. In the long term, the right level of R&D should bring substantial consumer benefits, see Chapter One.

Finally, Section 2.3. examines the Commission's use of product and geographic markets outside of the one directly at issue in the proceedings. While this does not, in and of itself, aid the Commission's pursuit of any specific objectives, such an approach widens the search for the agreement's effects. This can allow more objectives to be considered in the discussion. It also provides a more complete picture of the agreement's welfare effects.

2.1 Consumer welfare (or producer welfare?)

The decision to pursue either a consumer welfare or a producer welfare standard depends on a value judgment. Is it more important to protect the interests of consumers or producers? The answer to this question determines which efficiencies are considered beneficial. A consumer welfare standard, for example, could simultaneously enhance consumer protection, and undermine industrial policy.

Chapter One showed how producer welfare and consumer welfare models conflict. In general, proponents of consumer welfare want more competition, compelling producers to sell close to marginal cost. Reductions in allocative efficiency are unacceptable because consumers suffer. This is in direct contrast to the position under a producer welfare standard, which is concerned with gains to producers alone. A similar picture emerges in relation to both productive and dynamic efficiencies. The consumer welfare standard advocates more competition. This forces firms to invest and innovate, enabling them to reduce their costs (and thus their prices), forcing out their less efficient rivals. However, at a certain point, increasing competition undermines the incentive to invest and innovate. Competition authorities applying a consumer welfare model must balance the long-term need for innovation (and the future allocative benefits to be gained by consumers as a result) with the short-term allocative efficiency loss of letting prices rise above marginal cost, to pay for this investment. Producers, seeking to enhance their own welfare, highlight these ambiguous effects of increasing competition on both dynamic and productive efficiencies. But they have an additional reason for doing so. Less competition may reduce their incentives to innovate, but it also means that they can appropriate a larger share of any gains they make through such innovation.

The Community Courts have not expressly said whether the consumer or the producer welfare standard is appropriate under Community law.⁶⁵⁷ The Commission has been clearer. Chapter

⁶⁵⁷ See also, Frazer (1990), pages 620-623.

⁶⁵⁸ That said, they have impliedly rejected the producer welfare model. In the *Consten and Grundig Case*, page 348, the ECJ said that for the purposes of article 81(3)'s first test, improvements did not mean those accruing to the parties, but objective advantages. In certain cases, the ECJ could be interpreted as saying that total welfare is the appropriate test, but this is almost certainly wrong. In Joined Cases 46/87 and 227/88, *Hoechst v. Commission* [1989], paragraph 25, the ECJ said that the function of, amongst others, articles 3(g) and 81 was "...to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers."

One cited it as saying that the aim of the Community competition rules is to protect competition on the market *as a means of enhancing consumer welfare*. One group of economic commentators has said, of the Commission's policy:⁶⁵⁹

"...the promotion of consumer welfare is one of the main goals of European competition policy. At least in its declared objectives, the choice has clearly been made to favour income redistribution from producers with market power to consumers."

Article 81(3)'s first test *does not* adopt a consumer welfare standard. That said, article 81(3)'s second test insists that consumers must get "...a fair share of the resulting benefit..." of an agreement. Chapter Four showed the Commission combining the first and second tests in its article 81(3) analysis. Even where this is not the case, some believe that the second test influences the rest of the Commission's article 81(3) assessment such that a consumer welfare standard is, ultimately, demanded.⁶⁶⁰

To the extent that article 81(3)'s first two tests are combined, one would expect to see a test that favours consumer protection *even more* than would be appropriate under a 'pure' consumer welfare standard. Why? Under the consumer welfare standard, producer welfare increases are irrelevant, see Chapter One. Even if a producer welfare gain from a particular agreement were enormous, as long as there were some consumer welfare gain, the transaction would be allowed. This is not the position under article 81(3)'s second test, where consumers must get a *fair share* of any benefit. This implies that, in the scenario just outlined, Community law would insist that producers pass on not merely some (and not all of it either), but a fair share, of their welfare gain to consumers.

Sometimes, the Commission may follow this 'consumer welfare plus' standard. Commission decision, *Grundig's EC distribution system*, discussed in Chapter Four, could be an example of this. However, this approach is not normally in evidence and is not considered further here. Furthermore, the Commission has expressly said (without justifying its view) that:

"...the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement..."⁶⁶¹

However, this is not necessarily a reference to a total surplus test. Reich (1997), page 127, says that this passage "...tells us that competition law serves many purposes, one of which is the increase of consumer welfare." While this is not inconsistent with a total welfare test (which aggregates producer and consumer welfare, Chapter One), I am reluctant to place more emphasis on this passage, in light of a relatively clear and consistent message from the *Consten and Grundig* lines of cases, see B&C (2001), paragraph 3-023.

⁶⁵⁹ See, Neven, Papandropoulos and Seabright (1998), page 12. See also, Van den Bergh (2002), page 42 and Bishop and Walker (2002), paragraph 2.22.

⁶⁶⁰ See, for example, Schaub (2002), page 33 and Heimler and Fattori (1998), pages 598-600.

⁶⁶¹ Commission, *Article 81(3) Guidelines*, paragraph 85.

If the Commission adopts the consumer welfare standard (supporting Community consumer protection goals), and invariably it does, then producer welfare gains would be irrelevant. That said, there may be a gap between the Commission's policy statements and its decision-making practice. Indeed, Forrester says there:

"...is little trace of real concern for the welfare of consumers as the direct beneficiaries of [Community] competition policy. There is, however, more concern for citizens as indirect beneficiaries, residing in a healthy economy."⁶⁶²

Could we go further and suggest that some Commission decisions are based upon a producer welfare standard? Take, for example, Commission decision, *Iridium*, which involved a joint venture agreement to provide global digital wireless communications services. The agreement included pricing 'guidelines' for gateway operators. The Commission found, paragraph 42:

"...the principle of uniform prices....seems appropriate to fulfil customers' needs."

Is the Commission's view that customers must tolerate consciously parallel rate fixing as the price to pay for making European industry competitive? Probably not,⁶⁶³ and it would be going too far to argue that a producer welfare standard has been adopted. The Commission explains its acceptance of horizontal price-fixing with reference to consumers. Having said that, its justification for the consumer improvement is unconvincing.⁶⁶⁴

The Commission often highlights producer needs/ benefits in its analysis.⁶⁶⁵ Many Commission decisions also show a readiness to accept minor, speculative and unquantified consumer benefits,⁶⁶⁶ particularly where this might benefit Community industry,⁶⁶⁷ and especially in high technology industries, where the Commission believes that Community undertakings are being left behind by those from abroad.⁶⁶⁸ As a result, while the Commission does not implement a

⁶⁶² Forrester (1998), page 369. Others may agree. Buigues, Jacquemin and Sapir state that, in general, lax Community competition policy was designed to boost profit margins, providing a breathing space for Community producers, Buigues, Jacquemin and Sapir (1995a), page XX. See also, Cseres (2004), page 235 and Laussel and Montet (1995), pages 62 and 63.

⁶⁶³ Forrester (1998), page 369, agrees that such an accusation is probably unfair.

⁶⁶⁴ The Commission said that consumers would be moving in different areas of the world but will want to receive a single bill. These guidelines help achieve the coherence of the system, which aids this process, paragraph 42.

⁶⁶⁵ See, Commission, *Horizontal Guidelines*; Commission, *RCP 1994*, pages 23-26; Commission, *RCP 1993*, pages 90-92; Commission, *RCP 1992*, "The Commission is willing to facilitate...co-operation operations that allow firms to adapt and to improve their competitiveness in a global market." and Commission, *RCP 1991*, pages 44 and 45.

⁶⁶⁶ Reich (1997), pages 133-137. Neven, Papandropoulos and Seabright (1998), pages 104-106, also report that efficiencies are rarely quantified or given a serious hearing. In Commission decision, *Philips/ Osram*, the parties quantified the efficiency benefits, paragraph 26. That said, the Commission seems to have accepted their figures uncritically.

⁶⁶⁷ Forrester (1998), page 369, suggests that the explanation for Commission decision, *Iridium* "... may simply be that the Commission considers that the consumer welfare criterion is not very important when considering high-technology alliances, especially when these will create European networks..."

⁶⁶⁸ See, Neven, Papandropoulos and Seabright (1998), pages 13 and 14.

producer welfare standard (or even a total surplus), sometimes it gives the impression of coming close. One example of this is Commission decision, *Olivetti/ Canon*.⁶⁶⁹ The Commission examined a joint venture agreement, between Olivetti (Italian) and Canon (Japanese), to develop, design and manufacture copying machines, printers and fax machines. The agreement was exempted, paragraph 54, because in order to compete efficiently, producers needed the latest technology, requiring large R&D investments. The joint venture enabled the parties to spread these costs over more products. Community industrial policy was also aided by Canon's know how transfer to the Italian firm, which should "...contribute to improving the technological patterns of the EEC industry..." When it came to assessing customer benefits, paragraph 55, the Commission briefly said that they would benefit from new products and lower prices. The Commission did not go to much effort to check that this was true, nor to quantify these benefits, to ensure they outweighed clear restrictions on competition.

If the Commission were always pursuing a pure consumer welfare model one would expect less emphasis on producer welfare gains, unless we could be sure that there was sufficient competition to force the producers to pass such benefits on to consumers. There is no emphasis on the consumers' *fair share*, as outlined above. That is not to say that the Commission ignores consumers or has adopted a producer welfare model. Indeed, this is improbable. However, by playing with the welfare advantages that accrue to producers (as well as consumers) and by readily accepting that producer benefits will be passed on to consumers, in certain cases, the Commission can effectively give great weight to industrial policy arguments within its economic efficiency test in article 81. That said, Commission, *Article 81(3) Guidelines*,⁶⁷⁰ indicate that the Commission now wants more clarity in respect of what efficiencies are produced and their quantification. It also says that there can be no presumption that residual competition will ensure that consumers receive a fair share of the resulting benefit. It is, as yet, unclear how much this will affect the Commission's application of article 81 in practice.

2.2 Productive and dynamic efficiencies (at the expense of allocative efficiencies?)

We saw that dynamic and productive efficiencies can often exceed allocative ones, Chapter One.⁶⁷¹ The Commission⁶⁷² promotes research and development co-operation through its

⁶⁶⁹ Also see, for example, Commission decisions, *BPCL/ ICI*, paragraph 35; *Pasteur Mérieux-Merck*, paragraphs 82-90; Forrester (1998), pages 369 and 370; Reich (1997), pages 133-137; Bouterse (1994), Chapter 5 (restructuring of industry) and the *Metro I Case*, paragraph 47.

⁶⁷⁰ Commission, *Article 81(3) Guidelines*, paragraphs 51, 56-72 and 92-101.

⁶⁷¹ Technological competition is becoming increasingly important, Pitofsky (1998), page 333.

⁶⁷² Often encouraged by others, see, for example, European Parliament, *Resolution on the Twenty-fourth Competition Report*, paragraph 16.

economic efficiency test.⁶⁷³ It hopes to achieve its industrial policy goals through such means, see Chapter One⁶⁷⁴ and also to increase employment.⁶⁷⁵ There are also prospective consumer protection gains. The Treaty supports some promotion of R&D through co-operation between undertakings, see articles 163 and 164. It does this both within article 81(1) and (3) of the Treaty.⁶⁷⁶

How does the Commission promote research and development through its economic efficiency test? It does this by emphasising dynamic, as opposed to (static) allocative, efficiencies, see Chapter One. The Commission acknowledges that there can be a trade-off. Commission, *Horizontal Guidelines*, paragraphs 41 and 43, state:

"Cooperation in R&D may reduce duplicative, unnecessary costs, lead to significant cross fertilisation of ideas and experience and thus result in products and technologies being developed more rapidly than would otherwise be the case. As a general rule, R&D cooperation tends to increase overall R&D activities...

Under certain circumstances, however, R&D agreements may cause competition problems such as restrictive effects on prices, output, innovation, or variety or quality of goods."

So the Commission has a choice. Push R&D and risk reducing allocative efficiency. Or, focus on allocative efficiency gains and risk reducing the scope for investment in R&D, as prices fall to marginal cost? Chapter One showed that consumers may favour a reduction in allocative efficiency in order to achieve dynamic efficiencies. This is because, in the long term, in a competitive industry, producers should be forced to pass any cost savings (which can be much greater than the short term allocative losses, see Chapter One⁶⁷⁷) on to consumers.⁶⁷⁸ The Commission often adopts a long-term view of when the benefits might accrue.⁶⁷⁹ Furthermore, the Commission believes that Europe needs to 'catch up', technologically.⁶⁸⁰ Short term allocative efficiency losses, leading to R&D increases, and ultimately, long term allocative efficiency gains, can boost both industrial and consumer policy.

⁶⁷³ See, for example, Neven, Papandropoulos and Seabright (1998), Chapter 4; Commission, *RCP 1991*, pages 44 and 45 and Commission, *RCP 1985*, pages 11-15.

⁶⁷⁴ See, Forrester (1998), pages 373-376 and 380.

⁶⁷⁵ See, COM(2003) 96, page 2 and Commission decision, *Synthetic Fibres*, paragraph 37. More generally see Commission, *RCP 1993*, pages 21-26; COM(93) 700, Chapters 2, 4, 5 and 8; COM(94) 319 and Commission, *RCP 1995*, pages 31-35.

⁶⁷⁶ In relation to article 81(1) see, Commission decisions, *Iridium* and *Elopak/ Metal Box-Odin*, for example. There are many examples of this within article 81(3), see, for example Commission decision, *Ford/ Volkswagen*, below.

⁶⁷⁷ One of competition's most important benefits is to drive productivity growth through innovation, Porter (2001), page 922.

⁶⁷⁸ Obviously, similar difficulties arise elsewhere. For example, in relation to Canada see, Goldman and Barutskiski (1998), pages 388, 414 and 415.

⁶⁷⁹ See, for example, Forrester (1998), page 369 and Bouterse (1994), Chapter 5.

⁶⁸⁰ Temple Lang (1996), pages 551 and 552 and Korah (1987), pages 18 and 19.

Examples of the Commission's attitude are hard to substantiate. This is for two reasons. First, because of the lack of clear, explicit, reasoning by the Commission, as well as the general absence of thorough economic analysis. Secondly, because there is often just a difference of emphasis that would lead one to place a case in this section rather than in Chapter Four's section on industrial policy, or Section 2.1. above.⁶⁸¹

The Commission often advocates very high levels of R&D⁶⁸² and the attainment of these efficiencies within as short a time frame as possible.⁶⁸³ This can often only be achieved through research and development agreements, as opposed to by single firms. The Commission considers the possibility of dynamic efficiencies so important that it is often prepared to accept quite major reductions in static allocative efficiencies, in the hope that they will produce greater allocative efficiencies over the longer term.⁶⁸⁴

Commission decision, *Ford/ Volkswagen*, may well be an example of this.⁶⁸⁵ This decision, as you will remember, referred to an agreement between Ford and Volkswagen to develop, engineer and manufacture an MPV. Ford and Volkswagen would distribute them separately under their own brand names. The Commission found a breach of article 81(1), noting serious restrictions on competition in the relevant market and in others, principally as a result of allocative efficiency losses. Nevertheless, it was prepared to grant an individual exemption. At paragraphs 24 and 25, it emphasised the fact that through co-operation the parties should be able to produce an advanced vehicle designed to meet the requirements of European consumers. These are dynamic efficiency gains. Co-operation would also lead to a rationalisation of the manufacturing process, enabling both parties to combine their know how in many areas, these may involve dynamic as well as productive efficiency gains.

The Commission has also been prepared to take account of quite speculative gains in some cases, allowing it to rely on dynamic efficiency predictions even where they have not been clearly substantiated.⁶⁸⁶ One example is Commission decision, *BPCL/ ICI*. BPCL and ICI agreed the mutual sale of certain production units, technical know-how and goodwill for polyvinyl chloride (PVC) and low-density polyethylene (LDPE). BPCL also decided to close

⁶⁸¹ I have placed the cases where I think that the centre of gravity in the reasoning lies. That said, sometimes the Commission's reasoning bridges my artificial categorisations and so some cases appear in more than one section.

⁶⁸² See, *ACEA* and Commission decision, *CECED*, discussed in Chapters Three and Four, respectively.

⁶⁸³ For example, Commission decision, *ENI/ Montedison*, paragraph 31.

⁶⁸⁴ Neven, Papandropoulos and Seabright (1998), page 13.

⁶⁸⁵ Other possible examples are Commission decisions, *Synthetic Fibres*, paragraphs 34 and 35 (paragraph 24 seems to accept that there will be some, though not 'abnormally sharp', price rises); *BT/ MCI*, paragraphs 34-42; *ENI/ Montedison*, paragraphs 22-31 (paragraph 33 accepts that there will not be short-term price cuts) and *Bayer/ BP Chemicals*, paragraphs 18-30 (paragraph 34 seems to accept that there will be short-term price rises).

⁶⁸⁶ Neven, Papandropoulos and Seabright (1998), pages 104-106.

some PVC and chlorine wedge production units, while ICI would close some of its LDPE and ethylene production units. They also agreed to change the capacity rights in a jointly owned ethylene cracker as well as other supply agreements between BPCL and ICI for polyethylene and ethylene. The Commission found a breach of article 81(1).

In its article 81(3) analysis the Commission balanced an important loss of allocative efficiency⁶⁸⁷ against various productive efficiency increases as well as an extremely speculative dynamic efficiency gain, the release of funds from reducing losses, that could be used for research and development. At paragraph 35 the Commission said:

"The implicit and reciprocal obligation not to compete enabled ICI and BPCL to close their respective LDPE, PVC, chlorine wedge and ethylene plants, thereby both reducing immediately the industry-wide surplus capacity existing in the EEC and also leading to more-efficient production.

If ICI and BPCL by renouncing competition with each other, and by specializing, thereby manage to keep each other's customers in PVC and LDPE respectively, it will allow them to increase loading capacity both in the production of the product in which they are specializing and in ethylene. This increased loading will reduce unit costs and lead to more-efficient production. In addition, the closures stemmed a loss-making activity for both ICI and BPCL, thus releasing resources for investment, which will help promote technical progress. Finally, ICI and BPCL acquired each other's most-modern and efficient plant along with the technology in PVC and LDPE, respectively. This allowed ICI and BPCL to concentrate their production of PVC and LDPE, respectively, in the most-modern plants which, along with the increased loading, should lead to more-efficient production."

The Commission seems to go even further in its analysis in *Olivetti/ Canon*. There Olivetti and Canon proposed a joint venture to develop, design and manufacture copying machine products, laser beam printer products and facsimile products. The Commission found a restriction on competition but agreed to exempt the agreement. It was prepared to allow a reduction in allocative efficiency⁶⁸⁸ in order to allow the parties to increase their research and development expenditure. At paragraph 54 the Commission states:

"...on all the markets involved, and in which the parties are competing, the technology is fast-moving and the degree of competition high. In order to compete efficiently, the undertakings on those markets have to offer products which are the result of the most up-to-date technology, at competitive prices. Up-to-date technologies, however, require large investments in research and development. The expansion of production in the EEC which is

⁶⁸⁷ See paragraph 36.2, although the Commission claimed that price rises did not occur as a result of the agreement, but would have occurred anyway.

⁶⁸⁸ At paragraph 42 the Commission said that the "...setting-up of the joint venture restricts competition between the parent companies. These will no longer compete at the production stage (a) as to copying machines, for a segment which accounts for more than one-half of the low-range market, and (b) in future possibly also for the mid range and facsimile. This will result in identical production costs for both, with an inevitable influence at the sales stage...Each party will have less autonomy in determining its sale prices than it would have if its production costs were different from those of the other parent company. The scope for competition at the sales stage is thus limited as a result of the joint venture."

the effect of the joint venture enables the parties to spread the costs of these investments over a larger number of products: otherwise the costs of those products would be too high for producers to be able to sell them at a competitive price. The joint venture is therefore apt to avoid duplication in costs of development. Research does not fall directly within the scope of the joint venture. However, by virtue of the obligation on the partners to communicate to the JVC the continuing flow of their expertise, and on Canon the improvements of the research carried out independently, this research is tightly linked to the activity of the joint venture. Research will also be stimulated by avoiding the duplication of its costs."⁶⁸⁹

The Commission also relies on productive efficiency gains in order to implement its industrial policy aims here.⁶⁹⁰ The focus on productive efficiency arguments is one way of justifying the restructuring decisions in relation to the various Community industries.⁶⁹¹ This mechanism works in very much the same way as described in relation to dynamic efficiency. Indeed, productive and dynamic efficiency are often both discussed in the same case to justify the reduction in allocative efficiency.⁶⁹² However, this can, at times, come dangerously close to negating competition as the main process of economic organisation.⁶⁹³

The emphasis on high levels of R&D and the acceptance of quite speculative productive and dynamic efficiency gains by the Commission, have skewed its analysis away from allocative efficiency questions, at least in the short term. This is not to say that allocative efficiency is unimportant to the Commission; nor that this emphasis offers no benefits to consumers. However, by distorting its analysis the Commission incorporates industrial policy and employment objectives within the market-balancing mechanism,⁶⁹⁴ while promoting long term consumer protection goals.⁶⁹⁵ It is unclear whether Commission, *Article 81(3) Guidelines*, indicate a toughening of this stance, see above. The wording seems to demand a more thorough

⁶⁸⁹ Other examples may include, Commission decisions, *BT-MCI* and *Atlas*.

⁶⁹⁰ Forrester (1998), page 364 and Amato (1997), page 115.

⁶⁹¹ Commission decisions, *Synthetic Fibres* and *Stichting Baksteen*, as well as Commission, *RCP 1993*, paragraphs 82, 84, 85(i), 88, 89, 158; European Parliament, *Resolution on the Twenty-fourth Competition Report*, paragraph 15; Bouterse (1994), Chapter 5 and Monti (2002), page 1072.

⁶⁹² See, for example, Commission decisions, *BPCL/ICI*, paragraph 35 and *Bayer/ BP Chemicals*, paragraphs 27 and 30 as well as the cases cited above.

⁶⁹³ Wesseling (2000), page 39; Amato (1997), pages 62 and 114 and Streit and Mussler (1995), page 25.

⁶⁹⁴ See, for example, Schaub (1996), pages 76-78. This tendency may even increase because "...European competition rules are currently being revised in ways allowing for research and innovation aspects to be better taken into account when assessing market dynamics and competitive conditions.", COM(2003) 226, page 23. See also, Streit and Mussler (1995), page 25.

⁶⁹⁵ A longer-term consumer welfare perspective may also mean that other relevant objectives, for example, environmental considerations could be considered more readily. As Wasmeier explains "Because pollution generates enormous economic costs, in the long run it will be more reasonable from an economic stand point to take the necessary steps in time to prevent pollution from occurring. From this point of view, fundamental environmental protection requirements...are basically in line with economic requirements.", Wasmeier (2001), page 163. Also see, COM(93) 632, page 42.

and explicit quantification of efficiencies, but this is difficult⁶⁹⁶ and we have seen that there is sometimes a discrepancy between policy statements and practice.

But this leads us to another question, which is where does the balance lie between allocative and dynamic and productive efficiencies? This is extremely difficult to assess, due to a lack of clarity in the caselaw. One could argue that allocative efficiency considerations cannot be completely ignored in favour of dynamic and productive efficiency gains. The ECJ said in *Metro I* that price competition is so important that it can never be eliminated.⁶⁹⁷ However, such a position would not lie easily with that of the CFI in *Matra*,⁶⁹⁸ holding that, in theory, any restriction on competition, that complied with the four article 81(3) tests, could be exempted.⁶⁹⁹

This lack of clarity makes even a tentative discussion of where the balance is foolhardy.⁷⁰⁰ It may be that the Commission is more ruled by political considerations in these cases, but an explanation of the underlying principles it follows is vital. More clarity is needed, as well as an urgent need for the Commission to analyse the effects that its previous decisions have had on competition. As one commentator puts it:

"The technology outcomes of co-operative R&D arrangements initiated in Europe during the 1980s have proved disappointing so far."⁷⁰¹

A more structured, formal, efficiency analysis (and the enhanced certainty this generates) is more likely to ensure concrete gains to European firms.⁷⁰²

2.3 Total welfare?

An agreement may generate costs or benefits outside of its relevant product and geographic markets. Take liner-shipping conferences, for example. These are horizontal price-fixing cartels between shipping companies. The Commission defines the relevant market in such cases as liner

⁶⁹⁶ Some argue that a comparison of efficiencies and anti-competitive results is not workable on a case-by-case basis, see the summary of the literature provided in Fisher and Lande (1983), pages 1657-1659. Other commentators are, to varying degrees, more optimistic, please see, OECD (1988), page 41 and Areeda (1992), page 37.

⁶⁹⁷ The *Metro I* Case, paragraph 21.

⁶⁹⁸ The *Matra* Case, paragraph 85. See also Commission decision, *Glaxo Wellcome*, paragraph 153, now under appeal Case C-168/01 P.

⁶⁹⁹ Note that article 81(3)(b) only says that competition should not be eliminated. This is not necessarily solely price competition, see *Metro I Case*; but might also include, for example, R&D competition.

⁷⁰⁰ Commission, *Article 81(3) Guidelines*, paragraphs 102-104, provide no new objective techniques for assessing this.

⁷⁰¹ Paragraph 17, UNCTAD document TD/B/COM.2/EM/10/Rev.1. Also see Scherer (1992), pages 1,416-1,433. In part, this may be as a result of Community trade policy, see Gual (1995), pages 38 and 39.

⁷⁰² That is not to say that a good test will ensure that such gains are made. The failure of the R&D could be for reasons other than the competition related issues, including the parties' incompetence, for example. One might also point to the straight-jacket effect of many block exemptions, although this position is improving due to the use of market share thresholds in some of the more recent regulations.

trade services between, for example, the Community and the coast of West Africa.⁷⁰³ These cartels can lead to higher prices for shipping goods on the routes where they operate. This increases the cost of importing and exporting goods to Africa, for example, and thus affects the price of all shipped products too. These goods make up a different product market from the relevant product market in these cases. They may also have different geographic markets. Where shipping costs make up a large share of the value of these products, increases in these costs can significantly affect the quantity of the goods sold. If we solely focus on the relevant market then the effects on the shipped goods would be ignored, see below. By broadening our investigation and examining the agreement's effects on other markets a complete picture can be built up of its costs and benefits. In this thesis, we call this investigation the total welfare approach.

There are other advantages of examining all the effects of an agreement. First, a partial equilibrium assessment singles out a product or group of products, ignoring the way they interact with the rest of the economy. One of the weaknesses of this type of assessment is that the consumer welfare measurements it provides within that market are only valid if consumers spend a small fraction of their total income on the goods in question.⁷⁰⁴ Where this is not the case, ignoring the way this market interacts with the rest of the economy distorts our assessment of welfare effects.

Secondly, a total welfare method could help reduce the beggar-thy-neighbour attitude of many legislators. For example, in relation to export cartels, the US ignores the effects on consumers outside its jurisdiction.⁷⁰⁵ Export cartels' negative effects are not ignored because of the use of the partial equilibrium approach. That said, such a framework does not force us to consider the global consequences of the anti-competitive behaviour to the extent that a total welfare approach does. This may alert us to be more accepting of the negative welfare effects abroad.

Outlawing export cartels in particular and the adoption of the total welfare approach in general should also lead to a more co-operative relationship between competition authorities worldwide. This is because, to the extent this approach were followed in other jurisdictions too, the risk of conflicting decisions would be reduced.⁷⁰⁶ This should help reduce political tensions and increase co-operation between antitrust agencies worldwide.

⁷⁰³ See, Commission decision, *Cewal, Cowac and Ukwai*, paragraphs 12 and 13.

⁷⁰⁴ Motta (2004), pages 18 and 19 and Tirole (1988), pages 7-12.

⁷⁰⁵ See, Motta (2004), page 29 and Hovenkamp (1998), pages 429 and 430.

⁷⁰⁶ See, for example, the *Air Products and Air Liquide* merger, which looked like it would be blocked in the US and was allowed in the EU (Commission merger decision, *Air Liquide/ BOC*) due to the different effects in EU and US-related geographic markets.

Finally, a total welfare approach would give the Community more credence when persuading developing countries to enact clear and transparent competition legislation. This is because it reduces the appearance of bias, and the impact of industrial policy on the assessment.⁷⁰⁷

Nevertheless, stepping outside of the partial equilibrium framework can dramatically increase political and evidentiary problems. For example, should the regulator approve a cartel which increases welfare worldwide, but results in a net decrease in welfare within its jurisdiction? This might be difficult politically.⁷⁰⁸ So may the application of an antitrust law that overtly examines effects in other jurisdictions. On the evidentiary front, such a change would place parties under an obligation to investigate the benefit, or otherwise, of a specific action in markets potentially unrelated to their own. This could be very time-consuming, as well as costly. For the decision-maker too a total welfare approach poses evidentiary problems. It could potentially increase its reliance on jurisdictions outside of his or her seat. This may make evidence gathering more difficult.⁷⁰⁹ That is not to say that none of these problems exist already. The extra-territorial application of antitrust is well known and sometimes political tensions can arise as a result of decisions.⁷¹⁰ That said, these tensions and difficulties would increase under a total welfare approach.

There is obviously a tension between the partial equilibrium framework and the wider total welfare approach. The latter gives a more complete picture of the agreement's effects, the former is quicker and easier for both the parties involved and the decision-maker to apply.

The Commission has not consistently preferred either method. Sometimes it implies that the effects of an agreement outside of the relevant product market are irrelevant.⁷¹¹ In other cases it has, often with the approval of the Advocate-Generals,⁷¹² investigated the effects that an agreement will have on different product markets.⁷¹³ Similar confusion exists in relation to the

⁷⁰⁷ Townley (2004), pages 130-131.

⁷⁰⁸ Ross (1996-97), pages 644-652.

⁷⁰⁹ Townley (2004), page 134.

⁷¹⁰ Think of Commission merger decisions, *Boeing/ McDonnell Douglas* and *General Electric/ Honeywell*.

⁷¹¹ See for example, the *Matra* Case, *Matra* states, paragraph 64, that the decision allows the Founders the possibility of co-ordinating their behaviour in markets other than the MPV markets. The Commission implies this is irrelevant, paragraph 73, as does *Ford*, paragraph 81.

⁷¹² See, for example, the Opinion of Advocate-General Roemer in *Case 32/65 Italy v. Council and Commission* [1966], page 419.

⁷¹³ Advocate-General Warner notes this in *Case 61/80 Coöperatieve Stremsel- en Kleursel-fabriek v. Commission* [1981], page 878. See also, Commission decisions, *TAA*, paragraphs 294-296, 302, 303 and 312; *Bayer/ BP Chemicals*, paragraphs 32-34; *Continental/ Michelin*, paragraph 27; *KSB/ Goulds/ Lowera/ ITT*, paragraph 27; *P&I Clubs* (1999), paragraph 108; *TPS*, paragraph 114; as well as Commission, *RCP 1990*, page 31 and *Crampton* (1997), page 60.

geographic markets to be considered. The Commission has looked at different relevant geographic markets in some cases,⁷¹⁴ although it does not normally do so.

More recently, the Commission has sought to resolve this issue. Commission, *Article 81(3) Guidelines*, paragraph 43, comes out strongly in favour of the partial equilibrium approach:

"The assessment under article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers...must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market [footnote A]. Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market."

The Commission starts from the premise that the competition assessment must be made separately for each relevant market. This conclusion is based on two justifications:

- Community competition law has as its objective the protection of competition on the market; and
- the condition that consumers must receive a fair share of the resulting benefit confirms this approach.

Taking these points in turn, it is unclear what the Commission's first statement means. Nor does the Commission justify it. Can it be justified? As pointed out in Chapter Two, Community competition law's objectives can only be understood in the context of the whole Treaty. The Treaty's Preamble and article 2, emphasise the need to strengthen the unity of the Community's economies and to confirm the solidarity which binds us with those overseas. This does not support the Commission's statement. If anything, it leans towards considering the global effects of Community policies, although, in truth, there is little clear support for this either. Likewise, article 3(1)(g) and article 81(3)'s first condition do not expressly or impliedly restrict the analysis to the relevant market.⁷¹⁵

Perhaps the Commission is worried that positive effects on one market might coincide with the elimination of competition on the relevant market? This could cause significant harm. However, if this were its fear, article 81(3)'s fourth condition would allow it to block the agreement. Furthermore, imagine that an agreement is pro-competitive when examined from a partial

⁷¹⁴ For example, in Commission decision, *Glaxo Wellcome* (now under appeal Case C-168/01 P), the Commission defines the relevant geographic market as national, paragraph 114, and yet when it is discussing the welfare effects it looks across the whole EU and not just at the UK and Spain, paragraphs 184-186.

⁷¹⁵ This statement, in relation to article 3(1)(g), is discussed further below.

equilibrium perspective, i.e. on the relevant market. At the same time, it might significantly harm, or even eliminate competition in another market. If the Commission were able to move outside of a partial equilibrium then it could prevent this (unless it felt this prevented the achievement of article 81(3)'s first test). The total welfare approach gives the Commission more flexibility to assess the welfare (and other) effects as a whole.

What do the Community Courts say? The Commission relies on two judgments to support the partial equilibrium approach. Neither of them expressly consider the issue. At footnote A, paragraph 43, cited above, the Commission said:

"The test is market specific, see to that effect Case T-131/99, *Shaw*, [2002] ECR II-2023, paragraph 163, where the Court of First Instance held that the assessment under article 81(3) had to be made within the same analytical framework as that used for assessing the restrictive effects, and Case C-360/92 P, *Publishers Association*, [1995] ECR I-23, paragraph 29, where in a case where the relevant market was wider than national the Court of Justice held that in the application of Article 81(3) it was not correct only to consider the effects on the national territory."

The Commission's reliance on *Shaw* seems unjustified. The matter concerned a series of beer supply agreements between Whitbread plc and its tenants. These breached article 81(1), in part because of the cumulative effect of Whitbread's network and other similar networks of agreements.⁷¹⁶ Nevertheless, the Commission exempted the agreements, holding that beer supply agreements of the type at issue generally lead to improvements in distribution.⁷¹⁷ However, in this case, the tied lessees paid relatively high prices for Whitbread products, and the Commission thought that these might undermine the improvement in distribution.⁷¹⁸ Whitbread argued that its relationship with its lessees should not only be judged by reference to the prices they pay, but the whole business relationship should be taken into account to see if the lessee could 'survive'. The Commission accepted this, finding that overall there had been an improvement in distribution.⁷¹⁹

The applicants before the CFI were two of Whitbread's tenants. They argued that the Commission should not have exempted the agreements. Although it is unclear from the judgment, they appear to have argued that, when deciding on an individual exemption, the Commission should assess the existence of countervailing benefits at the individual level, rather than to Whitbread's lessees as a group. The CFI disagreed. At paragraph 163 it held:

"The disputed assessment of the countervailing benefits was made in the context of the examination of the grant of an individual exemption, after the finding that Whitbread's

⁷¹⁶ Commission decision, *Whitbread*, paragraphs 106-138.

⁷¹⁷ Commission decision, *Whitbread*, paragraphs 150-154.

⁷¹⁸ Commission decision, *Whitbread*, paragraphs 155-163.

⁷¹⁹ Commission decision, *Whitbread*, paragraphs 164-170.

network of agreements makes a substantial contribution to foreclosure of the market in question. That assessment therefore had to be made within the same analytical framework, that of the effect of the notified agreements on the functioning of the market, and hence on the situation of the tied lessees taken as a whole, not on each lessee considered in isolation."

The CFI's reference to making the article 81(3) assessment within the same *analytical framework* as the article 81(1) conclusions merely refers to the fact that the network of agreements was relevant in this case. One should look at the overall impact of all the notified agreements, in their economic context, as opposed to examining the impact on individual members of the group in isolation.⁷²⁰ The CFI does not consider whether considerations outside of the relevant market are pertinent.

The Commission's reference to Case C-360/92 P, *Publishers' Association*, [1995] can also be criticised. This case involved a fixed book agreement covering the UK and Ireland. The CFI had previously held that the Publishers' Association, established in the UK, when arguing in favour of an exemption for their agreement, was not entitled to rely on any negative effects that might be felt in Ireland. In other words, the CFI had said, do not look at the relevant geographic market (the UK and Ireland), just look at the UK. The ECJ corrected this position by holding that nothing in article 81(3) makes it:

"...subject to the condition that those benefits should occur only on the territory of the Member State or States in which the undertakings who are parties to the agreement are established and not in the territory of other Member States. Such an interpretation is incompatible with the fundamental objectives of the Community and with the very concepts of common market and single market."

The ECJ's point is that one cannot look smaller than the relevant market. To do so would make no sense in economic theory, because the relevant geographic market is the area on which competition takes place.⁷²¹ The ECJ does not say that one cannot look at other markets as well. Having said that, it does not say one can. So, it seems that there is a stalemate? However, in *CGM v. Commission*, the CFI, expressly advocated looking outside the partial equilibrium, at least in relation to the relevant product/ service market:⁷²²

"...regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market...but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement....Article 85(3) [now article 81(3)] of the Treaty envisage[s] exemption in

⁷²⁰ The Commission even makes this point when citing *Shaw* in, Commission, *Article 81(3) Guidelines*, paragraph 87.

⁷²¹ Vickers (2003a), pages 99 and 100.

⁷²² Lugard and Hancher (2004), pages 418 and 419, reach similar conclusions. See also, Geradin (2004), page 15.

favour of, amongst others, agreements which contribute to promoting technical or economic progress, without requiring a specific link with the relevant market."⁷²³

CGM v. Commission concerned intermodal transport services encompassing a bundle of, inter alia, inland and maritime transportation provided to shipping companies across the Community. The restrictions at issue related to inland transport services, which were held to constitute a separate market, whereas the benefits were claimed to occur in relation to maritime transport services.

The Commission refers to *CGM v. Commission* in Commission, *Article 81(3) Guidelines*, paragraph 43, at footnote B. The Commission defines the case as a limited exception to its general rule:

"...where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same [footnote B]."

The Commission argues that *CGM v. Commission* does not undermine its point because both product markets (inland transport services and maritime transport services) had the same consumers.

But why should the CFI's judgment be interpreted in this narrow way? The CFI does not expressly make such a link. In fact, paragraph 343's wording is much wider. The CFI even goes so far as to say that one should look at the effects *without requiring a specific link with the relevant market*. This seems contrary to the Commission's position, because it appears to argue that a specific link (that both product markets have the same consumers) is necessary.⁷²⁴

A possible reason why the Commission may feel that other product markets can only be considered if they have same consumers, is because it is collapsing article 81(3)'s first and second tests, see Chapter Four and Section 2.1. above. Whether or not this is acceptable at all is discussed below. However, on the assumption that it is, did the CFI collapse these two tests in *CGM v. Commission*? No.⁷²⁵ So collapsing these two tests to justify the narrow reading of the case does not seem appropriate.

⁷²³ Case T-86/95 *Compagnie Générale Maritime v. Commission* [2002], paragraph 343. The CFI's judgment in Joined Cases T-39/92 and T-40/92 *Groupement des Cartes Bancaires 'CB' and Europay International v. Commission* [1994], paragraphs 101-105, could imply that one should only look at the effects on the relevant product market. However, this is probably an incorrect interpretation. The statements could also be read as a criticism of the Commission for not defining the relevant product market correctly, it had proposed two alternatives.

⁷²⁴ The Commission also relies on Case T-213/00 *CMA CGM v. Commission* [2003]. However, the same comments apply to that case as to *CGM v. Commission*. In fact, at paragraph 227 of *CMA CGM v. Commission*, the CFI repeats paragraph 343 from *CGM v. Commission*, referred to above. It also rephrases it emphasising that one can consider the effects on '...any market on which the agreement in question might have beneficial effects...'

⁷²⁵ The Commission, in its underlying decision, found that customers did not get a fair share of the resulting benefit and the applicants argued before the CFI that this was incorrect. If paragraph 343 were meant to incorporate both of

To recap. The Commission argues that only the effects on the specific relevant product and geographic markets can be considered. It extends this to allow the effects in other related markets to be considered as long as they involve substantially the same consumers.⁷²⁶ The Commission justifies this by saying that the Community competition rules must protect competition on the market; as well as by reference to the Community Courts' caselaw; and the effect on consumers. So far, the Commission provides no justification for the first reason, nor can we suggest one. Furthermore, there is no explicit Community Court judgments supporting the Commission's position, indeed those that there are tend in the opposite direction.

A key part of the Commission's argument seems to be that consumers must get a fair share of the benefit. This is article 81(3)'s second test. As a result, the Commission seeks to limit the benefits that can be considered in article 81(3)'s first test. But, why should the wording of the second test delimit the first test? The Commission does not explain. Furthermore, even if such a link were made, would a delimitation, in the terms the Commission advocates, necessarily follow? No. Chapter Seven demonstrates that although the definition of consumer is not certain in the caselaw, there are many cases where the consumer considered is not a customer of the parties. Sometimes the consumer is a user of a derived product of the parties', i.e. something on a different product market, such as the purchaser of African textiles. The Commission admits as much at the end of paragraph 43:

"...in some cases only consumers in a downstream market are affected by the agreement in which case the impact of the agreement on such consumers must be assessed. This is for instance so in the case of purchasing agreements."

Linking article 81(3)'s first two tests is wrong.⁷²⁷ The Community Courts have stated that there are four separate tests under article 81(3) of the Treaty, not three. The first test established that society benefits from the restriction of competition, through the various relevant objectives such as increased employment and environmental policy. The second test ensures that consumers get a fair share of the benefits.⁷²⁸ In any event, as we have seen, collapsing the two tests does not establish that only the relevant market is relevant because the definition of consumer in article 81(3)'s second test is not restricted to the parties' customers and this can include other markets.

article 81(3)'s first two tests, then there would have been no need for the CFI to discuss the merits of the second test later in its judgment. However, it did, paragraphs 368-374. The CFI did not even refer to paragraph 343 in this part of its assessment.

⁷²⁶ Note that the Commission and the CFI only refer to the consideration of benefits in other markets. My application of the total welfare standard is wider than both of them because I also advocate the consideration of costs in other markets. Thanks to Giorgio Monti for this comment.

⁷²⁷ Monti (2002), pages 1076 and 1077. See also, Chapter Seven.

⁷²⁸ Ritter, Braun and Rawlinson (2000), page 116 argue that "It is hardly conceivable to affirm a valuable contribution to improving technological progress...if it is to the obvious disadvantage of customers..." but the Commission has accepted that they are different tests, Commission, *Article 81(3) Guidelines*, paragraph 46.

In law, there is no need to read the CFI's judgments in *CGM v. Commission* and *CMA CGM v. Commission* against their natural wording and in the restrictive manner proposed by the Commission. In fact, to do so may be positively harmful and could undermine welfare, for the reasons set out above. It may also effect the consideration of other relevant objectives, see Chapter Seven.

For example, in relation to developing countries, the Commission may even be obliged to adopt a total welfare approach. Article 177(1) of the Treaty says that Community development policy shall foster, amongst other things, the smooth and gradual integration of developing countries into the world economy as well as the campaign against poverty in developing countries. Article 178 of the Treaty instructs the Community to "...take account of the objectives referred to in Article 177 in the policies that it implements which are likely to affect developing countries."⁷²⁹ As far as possible, article 81 of the Treaty should be interpreted in line with articles 177(1) and 178 of the Treaty in a way that is both effective and so that both provisions are consistent with each other.⁷³⁰

The relationship between Community competition policy and development is complex.⁷³¹ However, by way of example, there is evidence to show that shipping cartels, see above, increase transport costs, reduce trade volumes and slow growth. This could affect the integration of developing countries into the world economy, as well as the campaign against poverty in these countries, see article 177(1) of the Treaty.⁷³² However, if the Commission and the Community Courts considered the competitive effects of agreements that fall within article 81(1) on product and geographic markets other than just the 'relevant' ones, then an agreement's effects on development and other policies could be more easily considered. Decisions that were pro-competitive, not just for the EU but for these developing countries could to be (relatively) quickly imposed, speeding up the integration of developing countries into the world economy, in line with the Treaty.

The more widely the Commission can cast its net in the search for an agreement's effects (both positive and negative) the more complete a picture it can draw up on how relevant Treaty objectives have been infringed. This applies to welfare as it applies to other objectives. It may

⁷²⁹ Furthermore, where distortions to competition arise in one of the ACP (a group of 77 Africa, Caribbean and Pacific countries) signatories to the Cotonou Agreement of 23 June 2000 (which came into force 1 April 2003), the duty to take into account the affect of Community antitrust decisions is reinforced, see article 45(2) of that agreement.

⁷³⁰ For a general exposition of this principle see Case C-67/96 *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999], paragraph 60.

⁷³¹ For a more detailed discussion see Townley (2004), pages 128-134, and the documents referred to there.

⁷³² Furthermore, where it affects them, such legislation does not lead to the elimination of distortions to sound competition in the ACP countries, article 45(2) Cotonou Agreement.

well be that an agreement's direct effects are innocuous on some objectives. However, the knock-on effects on others could be tremendous. Ideally, the Commission would be able to take such effects into account, i.e. on all product and geographic markets. Chapters Four and Seven demonstrate that some of the Treaty objectives that must also be considered within article 81 demand a more global approach. Adopting a total welfare model in relation to economic efficiency would make the treatment of all relevant objectives more consistent.

One could argue that article 3(1)(g) of the Treaty only refers to distortions of competition in the Common Market. However, in our view, and without forgetting the existence of the jurisdictional test of an 'effect on trade between Member States', we do not think that prevents analysis of extra-Community effects. First, as explained above, markets are interlinked, so affects abroad can distort competition within the Community. Furthermore, article 81 is not merely there to implement article 3(1)(g), see Chapter Two. Other relevant (non-economic) objectives often require analysis of extra-Community effects, see Chapter Seven.

We have argued in favour of a total welfare approach. That said, we have already discussed some of the difficulties that such a wide-ranging review would create. There must be some limits on the effects that need to be considered. Otherwise the necessary investigation will be too costly, time-consuming and difficult for the relevant undertakings (and the decision-makers) to perform, especially as they will often have no experience of the problems in other sectors.

There are mechanisms for reducing such problems without returning to the partial equilibrium framework, however. For a start, article 81's jurisdictional test (affect on trade between Member States) already restricts which agreements fall within article 81(1) in the first place.⁷³³ This reduces the cases that can be considered. Evidentiary problems may be limited through *per se* rules, such that costs or benefits in other markets could only be considered if they are above a certain magnitude, for example.⁷³⁴ This should be more efficient in the long-term.⁷³⁵ Secondly, regulators might limit their investigation to the effects on markets closely related to the relevant markets. This approach has already been adopted, to a certain extent, by the Commission in its competition reviews.⁷³⁶ Finally, while one should not artificially reduce the relevant geographic market to one's jurisdiction, when investigating the effect on total welfare, one might only assess the effects, or even only the direct effects, within that area.⁷³⁷

⁷³³ See, for example, Cases 89/85, etc. *Ahlström v. Commission*, [1988], paragraphs 16-18. Case T-102/96 *Gencor v. Commission*, [1999], paragraph 90 is wider, but this was a merger case.

⁷³⁴ See, for example, the position in Canada, Sanderson (1996-97), pages 631 and 632.

⁷³⁵ See, for example, Easterbrook (1992), pages 129-130.

⁷³⁶ See, for example, the form for notifying mergers, Form CO, Commission Regulation, *On Merger Notifications and Time-limits*, Annex A, sections 6-9.

⁷³⁷ See, for example, the comments of Wood (1999), page 15.

If the total welfare approach is used, we suggest adopting all these measures, with the exception of the last one (which undermines many of the reasons for adopting a total welfare approach in the first place). However, these changes would not be sufficient. It is also important to clearly lay down how these rules will work, so that parties can better assess their transactions and thus save costs. Chapter Eight discusses these issues further.

2.4 Conclusion of Section 2

We have tentatively pointed to three ways in which welfare analysis can be 'distorted' in order to achieve objectives outside of economic efficiency. These are: consumer welfare (or producer welfare); productive and dynamic efficiencies (at the expense of allocative efficiencies); and total welfare over a partial equilibrium approach. This study is based upon the analysis in Chapter One. We say tentatively, because the Commission is rarely explicit about what it is trying to do; normally fails to quantify any costs or benefits that it considers; and, does not place its analysis within a wider framework, which would allow us to more readily understand what it is seeking to achieve, or to predict its assessment in future cases.

The Commission has explicitly adopted a consumer welfare approach in its policy statements. This does not reflect the wording under article 81(3) of the Treaty,⁷³⁸ as it only demands that an agreement be neutral from a consumer perspective, as opposed to demanding that consumers get a fair share of the agreement's benefit. The Commission's decisions also refer to consumer benefits arising from the agreement, implying that the consumer welfare standard is being applied there too. That said, the Commission often pays a lot of attention to the agreement's effects on Community industry and, particularly when Community undertakings benefit from the agreement, the Commission readily finds relevant consumer benefits. In this way, industrial policy creeps into its efficiency assessment, at least to some extent.

Furthermore, the Commission particularly encourages R&D activities by Community undertakings. This is probably because of the industrial policy and employment benefits that it believes they bring. By readily accepting short term, and often substantial, allocative efficiency losses to achieve these ends the Commission hopes to increase R&D spending in the European Union. It has often accepted quite speculative dynamic and productive efficiency gains in its decisions. Once again it fails to quantify the costs and benefits of these agreements.

The Commission, *Article 81(3) Guidelines*, seem to be an attempt to put things on a more formal footing. They demand explicit listing and quantification of all purported efficiency gains. This would certainly be an improvement, bringing greater transparency to the Commission's assessment. However, it is insufficient. The Commission must set up a more formal, structured, method of welfare analysis, properly explaining when short-term allocative efficiency can be

⁷³⁸ And even less that of article 81(1) of the Treaty.

compromised for long-term gain, for example. A more precise definition of competition is imperative.⁷³⁹

The Commission favours a partial equilibrium approach. However, there are many advantages to the total welfare analysis. It allows us to make a more global welfare assessment, encourages co-operation between antitrust agencies, should improve consistency between them and may make it easier to further other Community objectives, such as development policy, in a pro-market manner. The Commission bases itself on two cases, which do not seem to support the points it attributes to them. In addition, its position flies in the face of two clear CFI judgments rejecting the partial equilibrium. If we follow the CFI, then there need to be limits placed upon what effects should be considered relevant in the antitrust analysis. Some suggestions are made in Section 2.3. The Commission must provide clear guidance on this issue.

3. MERE-BALANCING OVER MARKET-BALANCING

The Commission has three mechanisms with which to achieve a balance. We have looked at mere and market-balancing in some detail in Part B. Chapter One, also showed how welfare objective could achieve/ facilitate the pursuit of other Treaty goals. Which should the Commission favour?

In general the Commission emphasises market solutions first, this explains the efforts to internalise environmental externalities, for example.⁷⁴⁰ The Commission, rightly, justifies this emphasis by saying:

"In most areas of Community endeavour, if a policy runs against market forces and competition, it not only has less chance of success, but is also unlikely to benefit consumers."⁷⁴¹

The more that the relevant objectives are achieved through market forces, the harder it should be to justify balancing outside of this mechanism.

On a number of occasions the Commission has implied that only where it is clear that market forces have failed will it consider using mere or market-balancing and this is probably the best approach. An example of this can be seen in Commission decision, *Synthetic Fibres*.⁷⁴² In that

⁷³⁹ Neven (1998), pages 114 and 117.

⁷⁴⁰ For example, in relation to environmental protection, Commission, *RCP 1991*, page 54 and SEC(92) 1986, "...whenever possible [integration of competitiveness and the environment requires a strategy that] should be built around solutions based on the competitive functioning of markets."

⁷⁴¹ Commission, *RCP 1990*, page 16. This is in line with a general trend towards market-based solutions "The past 20 years have seen a pronounced shift in the role of government in business away from substituting for markets towards promoting them.", Colin Mayer, *Financial Times*, 28 August 2002, page 9.

⁷⁴² Also see, SEC(92) 1986. In Commission decision, *ENI/ Montedison*, the Commission, in its article 81(3) analysis said "Through cooperation the two groups will rationalize, more quickly and radically than was possible without cooperation, by concentrating on a few core businesses and discarding others in which they were less competitive

matter some of the parties in the industry had been seeking Commission permission to conclude a restructuring agreement between themselves for over 12 years, paragraph 9. The Commission said, paragraph 28, when granting an article 81(3) exemption, that the request had to be considered in the light of:

"...the overcapacity that existed in the synthetic fibres industry in 1982 and that is still running at a high level (around 30%) [mainly due to economies in scale which arise from bigger plants and new production methods] despite some reduction capacity in the past few years."

The Commission continued by saying that this should normally be for the individual companies to sort out alone, paragraph 30. However, paragraph 31, the Commission added:

"In the present case, however, market forces by themselves had failed to achieve the capacity reductions necessary to re-establish and maintain in the longer term an effective competitive structure within the common market."

However, market forces alone are not always sufficient.

"...the free play of market forces alone cannot, in an imperfect market, achieve certain priority objectives of the European Union, namely economic and social cohesion, an adequate level of research and development, environmental protection, the growth of SMEs and structural adjustment..."⁷⁴³

To the extent that they do not (or cannot) produce the desired balance, and with the possible exception of industrial policy,⁷⁴⁴ then the Commission is bound, under Community law to use mere or market-balancing. Which of mere and market-balancing should the Commission prefer in these situations?

and which dragged down their general performance...", paragraph 29. That said, sometimes the Commission is more willing to intervene, see Commission decision, *BPCL/ICI*, paragraph 35.

⁷⁴³ European Parliament, *Resolution of the European Parliament on the Twenty-fifth Competition Report of the European Commission*, in Commission, *RCP 1996*, page 357, paragraph B. Also see, ESC, *Opinion on the Commission's industrial policy communication*, paragraph 3.2.2; Commission, *RCP 1993*, paragraphs 2, 163 and 164; European Parliament, *Resolution on the Twenty-second Competition Report of the Commission*, in Commission, *RCP 1993*, Annex I, paragraph 12; Commission decision, *Olivetti/Canon*, paragraph 56 and, Snowball and Antrobus (2001).

⁷⁴⁴ In Commission, *RCP 1991*, regarding the link between competition and industrial policy, the Commission said, page 11, "When in its 1990 communication on industrial policy the Commission opted clearly for a system of open and competitive markets, it reaffirmed the role to be played by competition policy in boosting the competitiveness of Community industry...The new article 130 [now article 157] to be inserted into the EEC Treaty pursuant to the Maastricht Treaty on European Union confirms this approach: it states that the objective of ensuring 'that the conditions necessary for the competitiveness of the Community's industry exist' must not lead to the introduction 'of any measure which could lead to a distortion of competition'." See also, the Commission, *RCP 1994*, paragraph 14. Nevertheless, the Commission uses a mere-balancing test in relation to industrial policy too. Furthermore, as I pointed out in Chapter One, and as we have seen in this part, the idea that the Commission could merely implement value-neutral economic rules is farcical. As discussed, in contravention of the Treaty, industrial policy is not treated much differently from the other Treaty objectives.

We prefer mere (over market) balancing. This is due to the difficulty of making market-balancing transparent, and thus predictable. Not only are the underlying objectives difficult to measure, they are difficult to combine. Our analysis of the Commission's decisions illustrates this.⁷⁴⁵ A further benefit, discussed in Chapter Six, of calculating welfare before taking account of other objectives, is that the cost of the efficiency sacrifices being made in the name of industrial policy, and other relevant objectives, is more obvious. Furthermore, some economists suggest that many of the trade offs discussed in relation to market-balancing can be better dealt with in other areas of law, such as through the use of intellectual property rights.⁷⁴⁶

The Commission, and, in its shadow, the Member States' courts and competition authorities, have great scope for including many Treaty objectives within its article 81 analysis. Internalising externalities would normally be best. Where this does not work, then mere-balancing should (and must) be used. However, this power brings with it a responsibility. If the inclusions of these Treaty aims within competition policy is not to completely undermine the market system then the Commission must be as clear and transparent as possible.

4. CONCLUSION OF CHAPTER FIVE

A tentative assessment of the Commission's decisions indicates that it uses market-balancing (as well as mere-balancing) to achieve Treaty objectives. There is reason to believe that, on occasion, the Commission tempers its consumer welfare goal for industrial policy reasons. The Commission's ready acceptance of speculative dynamic and productive efficiency gains adds credence to this argument. Commission, *Article 81(3) Guidelines* aim to put article 81 analysis onto a more formal footing. This is welcome, but insufficient. A more precise definition of competition is needed, as is a more formal, structured, method of welfare analysis.

In our view, to the extent that it takes place, there is no room for market-balancing within article 81, such that consumer welfare should be tempered for producer welfare purposes, see Section 2.1. This is because such a process lacks transparency, and thus predictability; it helps disguise the cost of political decisions; and, the relevant objectives can be adequately accommodated using other policy tools. Where non-economic Treaty objectives need to be considered, mere-balancing should be used.

Finally, the Commission's advocacy of the partial equilibrium approach is not founded in law. The CFI has held that considerations outside the relevant market can be considered. This allows the Commission to take account of other effects, such as developmental and environmental

⁷⁴⁵ This does not remove all difficult trade-offs from the efficiency calculation. Chapter One showed that long term consumer welfare may be enhanced by increasing R&D in the short term and reducing short term allocative efficiency. However, transparency is significantly increased where this trade-off is done purely to achieve consumer welfare; as opposed to achieving the perfect balance between consumer welfare and industrial policy, for example.

⁷⁴⁶ See, Neven (1998), page 116 and von Weizsäcker (1980)

ones, which might fall outside the relevant market. This issue, and certain limits which might be imposed upon a total welfare approach, are considered in Chapter Seven.

CONCLUSION OF PART B

Schaub claims that:

"Community competition law is now a mature and fully-fledged system of law, which pursues the same aims and covers the same phenomena as most other competition law regimes."⁷⁴⁷

Whilst some of Community competition law's aims are similar to those in other regimes, we saw in Chapter Two that the foundations on which our system is based demand the consideration of non-economic objectives within article 81. These objectives sometimes clash with the economic goals that are also considered there. By way of contrast, in other jurisdictions, competition policy increasingly focuses on economic criteria. This leads us to the second claim, that Community competition law is now a mature and fully-fledged system of law. Part B raised many issues related to how to resolve the conflicts referred to above. It demonstrates that often, even basic, answers remain illusive. Would this be the case in a mature legal system?

"There are two kinds of legal uncertainty. There is good legal uncertainty i.e. unavoidable legal uncertainty which results from economic analysis, or from changes in circumstances... We can all live with that - no-one is complaining about that kind of legal uncertainty. However, the legal uncertainty that results from a gap in the way the system is being applied in practice and the way the legal framework is written is not tolerable, and must be addressed institutionally."⁷⁴⁸

Community competition policy must become more transparent.⁷⁴⁹ We need more clarity about which objectives can properly be considered within article 81. For example, we have seen that Member State objectives have been raised there, Chapter Four. Whether this is appropriate is discussed in Chapter Seven. Secondly, before we can be sure that a conflict is present, the relevant objectives must be clearly defined. There also needs to be an explanation about why each objective is being pursued, as this should affect its weight in the balance, see Chapters One, Three and Eight.

Part B has essentially asked three questions: how does the Commission balance Treaty objectives in article 81; where does it do this and what is the limit of the balance? In relation to the first question, two balancing methods are discussed, mere and market-balancing. market-balancing is conducted inside, and mere-balancing is conducted outside of the welfare

⁷⁴⁷ Schaub (2002), page 38. See also, Faull (1991) and Verstrynge (1988), page 2.

⁷⁴⁸ Venit (1998), page 471.

⁷⁴⁹ See, for example, Korah, V., in Ehlermann (1998), pages 525-541. For a contrary view, see Faull (1998), page 15 "On the few occasions that we [the Commission] pursue goals other than efficiency under article 85(3) [now article 81(3)], our proceedings are transparent..."

mechanism. This distinction is discussed in more detail above. Both methods have been used regularly and are still being used regularly by the Commission.

In Chapter Five's discussion of market-balancing, three avenues were highlighted. The first showed how the Commission seems to temper its consumer welfare goal for industrial policy purposes. We argued that this should not happen, because the process lacks transparency and helps disguise the cost of political decisions. This price is too high when the relative objectives can be adequately accommodated using other policy tools. However, if this method of balancing is to be used in future, guidance is needed about when it is to be favoured over mere-balancing.

The second avenue was to weigh short-term allocative efficiency losses against potential long-term allocative efficiency gains through encouraging R&D. Increasing the predictability of this trade-off troubles other competition authorities too. It can never be completely predictable, but clarity could be markedly improved through a more formal, structured, method of welfare analysis. Commission, *Article 81(3) Guidelines*, start this process. Some further mechanisms are suggested in Chapter Eight.

Finally, we suggested that the Commission's advocacy of the partial equilibrium framework is not founded in law. This issue, and certain limits which might be imposed upon a total welfare approach is further discussed in Chapter Six.

Mere balancing was discussed in Chapters Three and Four, in relation to article 81(1) and (3) respectively. While it is less common within article 81(1), there is evidence that it takes place there. It is unclear why this is happening when article 81(3) seems more appropriate. Chapter Six argues that balancing within article 81(1) should end. If this advice is not heeded then Chapters Three and Four raise some issues that must be resolved before article 81(1) balancing can make any claim to be mature.

Even as regards mere-balancing within article 81(3), which is less controversial, fundamental questions remain unanswered, see Chapter Four. The Commission rarely even discusses whether it is taking a specific objective into account at all. It should be more specific in its decisions about how and why it has decided a case in a certain way, see the discussion about the *Grundig's EC distribution system* decision. Also, the way that the Commission decides often means that political issues (highly relevant in the cases we are discussing) lead it away from DG Competition's original opinion.⁷⁵⁰ This must be better reflected in the final draft.

The mechanism that the Commission adopts when balancing is unclear and thus not repeatable, by undertakings, their lawyers, or the Member States' courts and competition authorities. The skeleton of a more transparent balancing mechanism is suggested in Chapter Eight.

Furthermore, the limits of the article 81(3) balance are also unclear. On the few occasions that the Commission has explicitly defined this, it did not follow itself when specific matters came before it. It does not explain why. Nor are the limits clear from the caselaw. There is a lack of transparency. Chapter Four's research showed that, where they are accepted as relevant in a given case, non-economic objectives have never 'lost' to the economic efficiency goal.⁷⁵¹ This is contrary to the 'perceived wisdom' in this area. The Commission should better explain the determinants of an objective's weight in the balance; the limits of the balance; and, how these limits change over time, see Part C. Instead of merely providing brief conclusions,⁷⁵² decisions should make the trade-offs explicit and explain why they were resolved in the way they were.⁷⁵³

Before ending this section we should make one more point. Where the parties to an agreement act in accordance with a specific Community law, DG Competition is more willing to accept the non-economic objectives. For example, in Commission decisions, *Eco-Emballages* and *DSD and others*, the parties were acting in compliance with certain Community environmental legislation. While it is not necessary to have prior Community support in this way, it clearly helps. Support for this proposition is given by the Commission, *Vertical Guidelines*, in the section defining environmental agreements, paragraph 171, which says:

"Environmental agreements are those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set forth in Article 174 of the EC Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations."

It is also beneficial to get another of the Commission's Directorate-Generals to support the agreement in question. This occurred in relation to both the *ACEA* and the *CEMEP* matters. Also, *VOTOB*, got the agreement of the Dutch Government. See Chapter Three.

The Commission is a political body, and political pressures can and do affect it. We might expect a reduction of this effect where article 81 decisions are taken by Member State courts and competition authorities, as they are theoretically more independent. This is far from clear. In any event, for some time after 1 May 2004, these bodies are likely to be extremely diffident to the opinions of Community institutions in relation to Community competition law and the resolution of conflicts within it. Their independence may also be questionable, especially in the face of national interests, see Chapter Two.

⁷⁵⁰ Monti (2002), page 1070.

⁷⁵¹ That is not to say that there are no 'external' checks on the balance. Chapter Seven discusses article 81(3)'s other three tests and how they interact with this balance.

⁷⁵² Ehlermann (1998), page x and Korah, V., in Ehlermann (1998), page 526.

⁷⁵³ Lipsky (1998), page 332 and Forrester (1998), pages 360 and 382.

In conclusion, in relation to conflict resolution between competing objectives within article 81, the citation of Schaub at the beginning of Part B's Conclusion seems wrong.⁷⁵⁴ The Treaty provides a different nest of values from other competition law systems. These values cannot be ignored. A mature system of law would explain how they should be taken into account; where this should happen and what the limits of this balancing process are. Community law is far from clear on any of these points. In this regard, Community competition policy is more like a spotty teenager. It is aware of many values. It knows that they must be taken into account and even does this sometimes. But it does so reluctantly and outside of a mature over-arching value framework.

Regulation 1/2003 formalises the Commission's leadership role in relation to articles 81 and 82. The reforms that this regulation has brought give the Commission more time to resolve fundamental competition problems, such as conflict resolution. The Commission's leadership role brings with it a responsibility. If the inclusion of these Treaty aims within competition policy is not to completely undermine the market system then the Commission must be as clear and transparent as possible and explain how and where to resolve conflicts in article 81, as well as what the limits of these conflicts are.

From what we have seen so far, the Commission (and DG Competition in particular) seems undecided on how to incorporate non-economic objectives into article 81. The Commission, its Legal Service and DG Competition must settle any internal debate on the issues under discussion and apply the outcome clearly and consistently.⁷⁵⁵ Part B shows there is much work to do.

Part C makes some suggestions in this regard. But, ultimately, the Community Courts must ensure that the Commission lives up to its responsibilities.⁷⁵⁶ To quote Lord Justice Woolf in relation to the English legal system:

"Appeals serve two purposes: the private purpose, which is to do justice in particular cases by correcting wrong decisions, and the public purpose, which is to ensure public confidence in the administration of justice by making such corrections and to clarify and develop the law and to set precedents."⁷⁵⁷

In relation to the consideration of non-economic objectives within article 81 this means that the Community Courts must openly declare that this is possible, as well as explaining where this should be done. They must force the Commission to clarify its balancing mechanism and to

⁷⁵⁴ See also, Whish and Sufrin (2000), pages 146-149 and Gerber (1994), page 143.

⁷⁵⁵ Whish (1998), page 502.

⁷⁵⁶ See Korah, V., in Ehlermann (1998), pages 529-541.

⁷⁵⁷ Lord Woolf, *Final Report on Access to Civil Justice*, Chapter 14. For similar points in relation to article 234 references and appeals to the Community Courts, see Evans (1983), page 591.

show how it applies this in its decisions, providing the reasons that article 253 of the Treaty demands. This does not mean that the Community Courts should weigh the relevant objectives themselves, to arrive at a final decision. Although they show increased propensity to do this in relation to merger cases⁷⁵⁸ this is not their role under article 81, either on appeal from the Commission or in an article 234 action. Having said that these cases are extremely positive in the sense that they have put tremendous pressure on the Commission to improve its merger decisions. The Community Courts should do the same under article 81, to ensure that the Commission provides reasons,⁷⁵⁹ within a structured framework. Only then may Community competition policy truly claim to have come of age.

⁷⁵⁸ See, Case T-342/99 *Airtours plc v. Commission* [2002]; Case T-310/01, *Schneider Electric SA v. Commission* [2002] and Case T-5/02, *Tetra Laval BV v. Commission* [2002].

⁷⁵⁹ Case T-95/94, *Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs and Brink's France v. Commission* [1995], paragraph 52, explains the need for reasoning in Commission competition decisions.

**PART C: HOW AND WHERE *SHOULD* PUBLIC POLICY
BALANCING *BE* PERFORMED IN ARTICLE 81?**

INTRODUCTION TO PART C

Many argue that non-economic objectives have no place within competition policy. They see competition policy as economic policy and do not want it to be complicated and 'tarnished' by non-economic considerations. More legitimately, they argue that competition policy cannot do everything. Non-economic objectives are important, but can often be achieved more efficiently using other mechanisms.

Chapter Two argued that, in the Community legal order, competition policy should not be isolated from the non-economic Treaty objectives. The Community Courts see the Treaty as a whole; they interpret it as a system for achieving article 2's underlying aims. This can require compromise. Sometimes competition must be restricted or distorted and non-economic objectives must be considered within, amongst others, article 81 of the Treaty.

Part B showed how this is currently done. It highlighted two mechanisms. The first, mere-balancing, takes place in both article 81(1) and 81(3) of the Treaty. There is little coherence in the consideration of non-economic ends in either place. Chapter Five argued that the second balancing mechanism, market-balancing, should not be used, because it is too opaque.

Part C reflects upon the problems raised in the first two sections of this thesis. It suggests a framework for the consideration of non-economic objectives. This is not an easy task. The current system is unacceptable. Prospective solutions will likely involve major re-organisation. This is not surprising. Today's rules are based on foundations established in the 1950s and 1960s. The world, the Treaty, our acceptance of antitrust, as well as our knowledge of economic theory, have all changed markedly since then.

Certain elements must be at the heart of any proposed changes. First and foremost, the decision-maker must be able to take account of the various relevant objectives within article 81. Secondly, businesses, decision-makers and consumers need clarity and transparency.⁷⁶⁰ Thirdly, the proposed system must respect the Treaty, unless amendments are proposed.

Chapter Six discusses article 81(1) of the Treaty. It highlights two substantive problems in relation to this provision. First, the definition of a restriction of competition. The test proposed by the Commission and the CFI is unclear and unsatisfactory. An economic efficiency standard is suggested. Secondly, Chapter Six discusses the presence of mere-balancing within article 81(1) of the Treaty, arguing that it should not occur there. These two suggestions provide greater clarity, while, we argue, respecting the Treaty's telos.

⁷⁶⁰ Part B asked a series of questions that, as a minimum, must be answered before balancing of non-economic objectives within article 81 can be considered coherent and transparent at a basic level.

Chapter Seven analyses the four tests under article 81(3) of the Treaty. It considers some of the implications of incorporating non-economic objectives within that provision and suggests how this might better be done. In light of the balancing test under article 81(3)'s first condition, Chapter Seven also suggests that article 81(3)(a) should be reinterpreted, and that the other two article 81(3) conditions be removed. Chapter Eight provides a framework for balancing the non-economic objectives under article 81(3)'s first test.

These changes sound dramatic. In reality, most are not. Many of the ideas discussed here have their roots in the existing caselaw or Commission decisions. As we said above, the world and the Treaty have changed substantially since 1957, new interpretations and techniques are needed to blend these together. The Treaty's words are less important than its structure and underlying telos.⁷⁶¹ There are no constitutional obstacles to prevent Community competition policy evolving to meet new demands.⁷⁶² Indeed, there is a constitutional imperative for this, where the current interpretation does not reflect this telos. This means that we can never consider the interpretation of any of the Treaty's provisions to have been permanently settled. They must be consistently reassessed in light of the system as a whole.

Non-economic objectives must be considered within article 81 of the Treaty. Part C offers some foundations for their consideration there and points the way to future demands that these objectives will place upon us. It does this in light of Chapter One's theoretical insights, although it takes care to restrict the analysis to that acceptable in the Community legal order.

⁷⁶¹ Jones and Sufrin (2001), pages 88 and 89 and Chapter Two.

⁷⁶² Frazer (1990), page 615.

**CHAPTER SIX: HOW AND WHERE *SHOULD* NON-ECONOMIC
OBJECTIVES BE CONSIDERED IN ARTICLE 81(1) OF THE
TREATY?**

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1. INTRODUCTION

Competition is an important principle within the Community legal order. There are many references to it throughout the Treaty. In particular, agreements between undertakings which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market are prohibited as incompatible with the common market, article 81(1). Nevertheless, Chapter Two demonstrated that non-economic objectives are also important within the Community legal order and should be considered within article 81 of the Treaty.

Despite the emphasis placed upon it, competition is not defined in the Treaty. Furthermore, Part B indicated a lack of consistency in how and where conflicts are resolved between this and non-economic objectives within article 81. Chapter Six deals with these two issues.

Section 2 asks what article 81(1) of the Treaty means by "...prevention, restriction or distortion of competition..." The expression is unclear. So, we discuss ways of defining the term, taking account of article 81's purpose. We conclude that article 81(1) would best be defined as an appreciable restriction of economic efficiency.

Then, Section 3, deals with the lack of clarity generated by mere-balancing non-economic objectives within article 81(1) of the Treaty. Chapter Three observed that mere-balancing probably takes place within this provision. It is unclear whether this is true and, if it is, how and where such balancing should be performed. We suggest that mere-balancing be restricted to

article 81(3). Why? Conducting mere-balancing in article 81(1) decreases transparency, undermines the Commission's corporate social responsibility initiatives and ignores article 81's structure.⁷⁶³ On top of that, it is unnecessary. There is no need for mere-balancing within article 81(1). Indeed, the best place for it is article 81(3) of the Treaty.

Are these issues still relevant today? Even if many agreements fall within article 81(1) of the Treaty, due to a strict economic freedom approach, they can now be immediately exempted under article 81(3). Surely, under Regulation 1/2003, article 81 can now be enforced as a unitary norm by Community and Member State enforcers alike? Korah puts it like this:⁷⁶⁴

"The reform would effectively end the bifurcation of 81(1) and (3). Whether the market analysis is carried out under 81(1) or (3) will no longer matter once courts and national authorities can proceed to analysis under article 81(3). The wide scope historically given to 81(1) will cease to be important."

Korah is right in that now article 81, in its entirety, can be applied by the same decision-maker, in the same forum, the bifurcation of this provision is less important.⁷⁶⁵ However, Regulation 1/2003 does not:

- mean that the wide reach historically given to 81(1) ceases to be important;
- remove the need to clearly define article 81(1)'s scope; or,
- obviate the problems caused by mere-balancing in that provision.

Article 81(1)'s reach is still important. Where agreements fall within article 81(1), they are void unless they can be exempted under article 81(3) of the Treaty. There is also a risk of fines. Where article 81(1) is interpreted widely, then a full balancing of public policy objectives under article 81(3) of the Treaty becomes necessary more often. This balancing exercise is expensive to conduct and the outcome hard to predict. A wide article 81(1) definition encourages litigation to upset the parties' bargain.⁷⁶⁶ This discourages investment, as contracts become less certain.⁷⁶⁷

⁷⁶³ It also obscures the cost of the efficiency sacrifices made in the name of non-economic objectives. Theoretically, welfare could be considered separately even within article 81(1) of the Treaty. However, welfare analysis itself requires a balancing exercise, see Chapter One. This may prove too tempting a shield for the consideration of these other aims, which may mean that they will not be treated truly separately. In our view, it is better to clearly remove non-economic considerations from this stage of the analysis altogether.

⁷⁶⁴ Korah (2000), page 189. See also page 361. Gyselen (2002a), page 197, talks of a "...seamless substantive legality test..." Gavalda and Parleani (2002), page 333, "La décentralisation, et la fin programmée du monopole de la Commission pour exempter individuellement sur la base du §3, va entraîner une globalisation de l'analyse conduite sur la base de l'article 81."

⁷⁶⁵ Korah and O'Sullivan (2002), page 120, say "The bifurcation of article 81 will remain but be less important.", Venit (2003), page 575, agrees. Albors-Llorens (2002), pages 72 and 73, adds "...the procedural advantages promoted by the advocates of the 'rule of reason' approach, would no longer be pertinent."

⁷⁶⁶ Forrester (2001), page 45. Gyselen (2002a), pages 190 and 191, argued in favour of interpreting 81(1) widely for procedural reasons, but this was before the changes wrought by Regulation 1/2003, article 3.

⁷⁶⁷ Siragusa (1998), pages 543 and 544; Venit (1998), pages 567 and 568 and Hawk (1995), page 983.

When there is ambiguity about what article 81(1) refers to, this problem is exacerbated.⁷⁶⁸

Ambiguity may arise for many reasons. Key among them is that:

- a 'restriction of competition' has not been clearly defined; and,
- mere-balancing (sometimes) takes place there, and this is not a transparent process.

Therefore, one still needs to be able to clearly understand what a restriction of competition is.⁷⁶⁹

Article 81's burden of proof is also an issue. Regulation 1/2003, assigns a different burden of proof to article 81(1) (the party alleging the infringement) and (3) of the Treaty (the party claiming the benefit of this provision). At least some Member States' courts, if not other decision-makers, are likely to take the different burdens of proof quite seriously. Therefore, it is important to know what objectives can be considered within each paragraph. It also makes splitting the economic efficiency analysis between these paragraphs, as has often been done in the past, yet more artificial. An overly strict interpretation of article 81(1), such that likely pro-competitive effects cannot be considered there, may also place an undue burden on the defendant. This is particularly so where vertical agreements are at issue, as they are normally considered to lead to at least some efficiency benefits.⁷⁷⁰

One might even say that these issues are of particular import to undertakings since 1 May 2004. Once an agreement had been notified to the Commission under Regulation 17 there was immunity from fines.⁷⁷¹ This is no longer the case under Regulation 1/2003. Furthermore, before the reforms the Commission had insufficient time to review all cases. There is likely to be much more competition enforcement today as Member States' courts and competition authorities, as well as individuals, are encouraged to use article 81. As a result, undertakings are potentially open to more attack with less protection. Of course there is now no need to notify, which saves costs. It also means that one can take advantage of article 81(3) more easily, so undertakings are not necessarily worse off. I merely seek to show that they are exposed still and that this is made worse due to the ambiguity about what is relevant in article 81(1) of the Treaty. Being able to understand the legal provisions that apply to them is vital.

⁷⁶⁸ Even more so where at least one of the objectives in the balance ('competition') has not been clearly defined. Furthermore, article 81(3)(b) of the Treaty says that the agreement must not afford the undertakings the possibility of eliminating competition. This provision is discussed in Chapter Seven. However, 'competition' is likely to have a similar meaning throughout article 81. As a result, if the term is unclear in article 81(1), it is unclear in article 81(3) too. This adds a further level of difficulty in predicting the outcome of litigation.

⁷⁶⁹ Whish (2003), page 107, says "...it is still important to apply article 81(1) with intellectual rigour, and to apply it only to agreements that really do restrict competition..."

⁷⁷⁰ Verouden (2003), page 573.

⁷⁷¹ Unless there has been a clear infringement, although this is not certain, Korah (2000), page 209.

2. "...PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION..."

Section 2 asks what article 81(1) of the Treaty means by "...prevention, restriction or distortion of competition..." The expression is unclear. Neither the Treaty, nor the Community Courts, nor the Commission have defined the term with sufficient clarity (or consistency) such that it can be applied by undertakings, Section 2.1. This is unacceptable. Companies can reasonably expect.⁷⁷²

"...an adequate level of predictability and consistent application of the rules that allows them properly to assess how the rules will be applied."

As a result, the remainder of Section 2 is dedicated to finding appropriate guiding principles that properly balance (in the Community context) the need for legal certainty with the flexibility required for governing an economy in a state of constant flux. Section 2.2. asks whether economic freedom can provide an appropriate foundation for such rules. It concludes that this is not the case. Section 2.3. advocates the adoption of an economic efficiency test.

Throughout this discussion we must remember that article 81 should be interpreted in light of the Treaty's objectives as a whole and that these objectives change over time. As a result, article 81's interpretation may change over time too.

2.1 "...restriction of competition..." is currently unclear

Much of the Treaty's wording is open-textured⁷⁷³ and, despite its emphasis upon the term, nowhere does it define 'competition',⁷⁷⁴ let alone a 'restriction of competition'.⁷⁷⁵ This is hardly surprising given the dynamics of the object being regulated here, an economy that is in a constant state of flux.⁷⁷⁶

Some will undoubtedly argue that wording such as 'restriction of competition' is incapable of what might seem like manipulation. It has a meaning and that meaning simply needs to be made apparent.⁷⁷⁷ This is not the case.⁷⁷⁸ In the words of Bright:

⁷⁷² Mario Monti in Ehlermann (2001), page 9. See also, Marengo (1999), page 1231.

⁷⁷³ Baquero Cruz (2002), page 10.

⁷⁷⁴ Souty (2003), pages 16 and 55.

⁷⁷⁵ Article 81(1)(a)-(e) of the Treaty provides examples of restrictions of competition, such as directly or indirectly fixing purchase or selling prices or sharing markets or sources of supply. However, "...this is insufficient in itself to explain the numerous intricacies involved in understanding how this article works.", Whish (2003), page 106. See also, Verouden (2003), pages 529 and 530. The notion of 'competition' is further discussed in Chapter Seven, in relation to article 81(3) of the Treaty. Similar problems emerge there to those under article 81(1).

⁷⁷⁶ See, Möschel (1991), page 7.

⁷⁷⁷ Marengo (1999), page 1218.

⁷⁷⁸ Indeed, Bork (1993), pages 58-61, distinguishes at least five definitions of 'competition'. See also, Areeda and Hovenkamp (2000), paragraph 100a, "...ambiguity goes to the very meaning of the terms in question."

"As with any broad and simply stated legal rule, a number of approaches can be consistent with the wording of the provision. The issue is which approach is, taking into account the purpose of the provision, most appropriate."⁷⁷⁹

So is the appropriate approach clear? We turn to the statements and decisions of the Commission and the Community Courts. We also discuss how they have been interpreted by the doctrine.⁷⁸⁰

In our view, neither the Community Courts, nor the Commission have defined 'restriction of competition' with sufficient clarity (or consistency) such that it can be adequately applied by undertakings, or the Member States' courts and competition authorities.⁷⁸¹ This failure operates on two levels. First, they have not properly explained the underlying principles which guide their definition of a 'restriction of competition'. This issue is rarely discussed in the doctrine.⁷⁸² Secondly, and possibly as a result of this first failure, it is extremely difficult to apply article 81(1) in practice. We examine these two points in turn. This is not done in order to define a 'restriction of competition'. We merely seek to highlight the ambiguity in its interpretation.

2.1.1 'restriction of competition' - exploring the underlying principles

Following the Ordoliberal tradition,⁷⁸³ Monti argues that a 'restriction of competition' under article 81(1) of the Treaty is "...an undue restriction of the economic freedom of the parties or a restriction on other market participants..."⁷⁸⁴ Monti believes that recent caselaw also supports this interpretation of article 81(1) of the Treaty. In his view, both Community Courts:

"...have interpreted the notion of a restriction of competition in article 81(1) as a restriction on freedom of action of market participants."⁷⁸⁵

⁷⁷⁹ Bright (1995), page 506. See also, Hildebrand (2002), page 183; Gerber (1998), pages 345 and 385-387; Joerges (1997), page 10 and Schröter (1987), page 691. Furthermore, Forrester (2001), pages 91-93, writes that when (in 1958) the British Embassy in Paris asked the French Government about article 81 and 82's remit "...neither the Member States nor the Commission were able to respond to the UK's questions about how the competition rules would affect executed agreements."

⁷⁸⁰ This is not an easy task, particularly in light of the balancing process taking place within article 81(1), see Chapter Three.

⁷⁸¹ See also, Commentaire Megret (1997), page 171.

⁷⁸² Uitermark (1996), page 6 and Gerber (1998), pages vii and 387.

⁷⁸³ The Ordoliberal tradition is briefly discussed in Section 2.2. below.

⁷⁸⁴ Monti (2002), page 1061. See also, Venit (2003), page 548; Lenaerts (2002), pages 32 and 33; Schröter (1987), pages 667-670 and Jacquemin and de Jong (1977), pages 198 and 199. Of the five, only Monti and Schröter justify their view with reference to the Community Courts' caselaw or Commission statements and decisions, see below.

⁷⁸⁵ Monti (2002), page 1061. See also, Vossestein (2002), page 857 and Faull and Nikpay (1999), pages 86 and 87.

Monti relies on two recent cases to support this view.⁷⁸⁶ The first, *Métropole télévision*, was an appeal from Commission decision, *TPS*. It involved an agreement to create Télévision par satellite (TPS) whose object was to devise, develop and broadcast, in digital mode by satellite, a range of television programmes and services, against payment, to French speaking television viewers in Europe. TPS was a partnership between six major companies. Some were active in the television sector, others in the telecommunication and cable distribution sectors. One of the grounds for appeal was that the Commission, paragraph 68:

"...should have applied article 85(1) [now article 81(1)] of the Treaty in the light of a rule of reason rather than an abstract rule."

In the applicants' view, cases such as *Nungesser* and *Coditel* confirmed the existence of a rule of reason under article 81(1), paragraph 68.⁷⁸⁷ Furthermore, they argued that, under this rule:

"...an anti-competitive practice falls outside the scope of the prohibition in article 85(1) [now article 81(1)] of the Treaty if it has more positive than negative effects on competition on a given market."

The CFI thought otherwise. At paragraph 72 it argued that a rule of reason had not been confirmed by the Community Courts. The CFI accepted that some of the Community Courts' judgments have favoured a more flexible approach to interpretation under article 81(1), paragraph 75.⁷⁸⁸ However, the CFI added, paragraph 76:

"Those judgments cannot...be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in article 85(1) [now article 81(1)] of the Treaty. In assessing the applicability of article 85(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned..."

The CFI added, paragraph 77:

⁷⁸⁶ Case T-112/99 *Métropole télévision (M6) and Others v. Commission* [2001], paragraphs 76 and 77 and Case C-309/99 *J.C.J. Wouters and Others v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002], paragraph 97. Some earlier caselaw also supports him. See, for example, Case 86/82 *Hasselblad v. Commission* [1984], paragraph 46, where the ECJ held "As the Commission rightly points out, a prohibition of sales between authorised dealers constitutes a restriction of their economic freedom and, consequently, a restriction of competition." and other references in Schröter (1987), pages 667-669.

⁷⁸⁷ The *Nungesser Case* and Case 262/81 *Coditel SA, Compagnie Générale pour la Diffusion de la Télévision, and Others v. Ciné-Vog Films* [1982], paragraph 20.

⁷⁸⁸ The CFI cited Case 56/65 *Société Technique Minière v. Maschinenbau Ulm* [1966]; the *Nungesser Case*; the *Coditel Case*; the *Pronuptia Case*; the *Gottrup-Klim Case*, paragraphs 31-35; Case C-399/93 *H.G. Oude Luttikhuis and Others v. Verenigde Coöperatieve* [1995] and the *European Night Services Case*.

"That interpretation...makes it possible to prevent the prohibition in article 85(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties."

The CFI makes two points here. First, for the purposes of article 81(1), a restriction of competition cannot be defined in the abstract as every restriction of the parties' freedom of action. Secondly, account should be taken of the actual conditions in which the agreement functions. The second case that Monti relies upon, *Wouters*, confirms these points.⁷⁸⁹

Do these two cases justify Monti's conclusion that the Community Courts have interpreted the notion of a restriction of competition in article 81(1) as a restriction on the freedom of action of market participants? The situation is far from clear. Neither court actually defines what a restriction of competition is. They merely hold that it is not every restriction of economic freedom.

Three interpretations are possible. First, Monti assumes that the Community Courts are saying that a restriction of competition is a restriction of economic freedom. The reference to 'context' is merely there to show that article 81(1) should not be applied in the abstract to all restrictions of economic freedom, but just to 'undue' restrictions. Whether or not a restriction is 'undue' can only be determined in the context in which the agreement actually operates. Many disagree that the jurisprudence unambiguously points this way. Summing up the conclusions of a group of competition law experts, Whish says that several Community Court judgments eschew the confusion between restrictions of competition and restrictions of conduct.⁷⁹⁰ This implies that economic freedom was/ is not (always) an issue under article 81(1) of the Treaty.⁷⁹¹

If the Community Courts (sometimes?) avoid basing their article 81(1) decisions on economic freedom, what other objectives might they be referring to in *Métropole télévision* and *Wouters*? The Community Courts may be saying that a restriction on competition should not be determined by asking whether or not there is a restriction of economic freedom (i.e. whether or not the agreement restricts economic freedom is irrelevant). Instead, we should ask whether there has been a restriction of competition (whatever that is) by examining the context in which the agreement actually operates. What, then, might a restriction of competition be? Confusion arises, in part, because more than one objective is relevant under article 81(1). For example, the ECJ has said:

⁷⁸⁹ At paragraph 97 of *Wouters* the ECJ holds "...not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in article 85(1) [now article 81(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects."

⁷⁹⁰ Whish (1998), page 499. admittedly, this statement was made before either *Wouters* or *Métropole télévision*.

"...an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85(1) [now article 81(1)] is designed to pursue this aim..."⁷⁹²

It is certainly true that market integration was the first objective of article 81 for some time.⁷⁹³ This explains the Commission's emphasis on vertical restraints, for example. Having said that, market integration is not the only criterion used to assess restrictions of competition. Another possibility is that article 81(1) of the Treaty incorporates an economic efficiency test. Although it is a hotly debated topic,⁷⁹⁴ many authors,⁷⁹⁵ as well as the Commission,⁷⁹⁶ argue that the Commission and the Community Courts have already applied an economic efficiency test within article 81(1), at least some of the time.⁷⁹⁷ Perhaps article 81(1), as interpreted by the CFI in *Métropole télévision* is an economic efficiency test? This is discussed further below.

A third alternative, suggested by Odudu, is that article 81(1) demands *both* a restriction of economic freedom and something else, which he suggests is an appreciable allocative efficiency loss. He says, for example, that:⁷⁹⁸

"A restriction on the commercial freedom of one of the parties is distinct from a restriction on the commercial freedom of one of the parties that restricts competition..."

A restriction on conduct is not a restriction on competition unless it results in higher prices, and lower quality or quantity of goods produced."

Let's pause here for a moment. This is a fundamental disagreement. The underlying motivation for the Community Courts' interpretation of article 81(1) is still not clear. Even in the most recent jurisprudence. In the past, economic freedom was sometimes the basis for the analysis,

⁷⁹¹ Although it is unclear, Whish's observation seems to be based on the line of cases starting with Case 56/65 *Société Technique Minière v. Maschinenbau Ulm* [1966]. These are discussed in Section 2.1.2.

⁷⁹² The *Consten and Grundig Case*, page 340.

⁷⁹³ Verstrynge (1988), page 3; Gerber (1998), pages 374, 385 and 386 and Verouden (2003), pages 527, 539 and 530.

⁷⁹⁴ See, Whish and Sufrin (1987), pages 20-36; Verstrynge (1988), page 8; Korah (1986), pages 98-103 (although she thinks that there should be a rule of reason, Korah (1981)); Manzini (2002), pages 395-397 and Manzini (2003), pages 287/II-296/II, as well as the references in all these papers.

⁷⁹⁵ Forrester and Norall (1984), pages 38-40; Venit (1986), pages 217 and 218; Korah (1990), page 1018; Hawk (1995), pages 982 and 983; Riley (1998), pages 483, 484 and 491; Hildebrand (2002), Chapter IV and Souty (2003), pages 56 and 61.

⁷⁹⁶ See, Commission, *White Paper on Modernisation*, paragraph 57.

⁷⁹⁷ Some argue that this tendency is increasing, see, Faull (1998), page 506; Heimler and Fattori (1998), page 596 and Ritter, Braun, and Rawlinson (2000), page 16. However, others treat this assertion more sceptically, see, Whish (1998), page 499 and Uitermark (1996), pages 9-11, or at least "...the Commission should look more rigorously into the economic aspects of the matter."

⁷⁹⁸ Odudu (2001), pages 263 and 264. This article appeared before the CFI's judgment in *Métropole télévision*.

see above. Has this changed? Monti is certain that it has not. But he does not discuss this point. Nor does he explain why, if the Community Courts unequivocally support his position, they did not unambiguously say so. This is particularly important because, as mentioned in Chapter Three, the Community Courts have found restrictions of competition even where agreements do not contain any contractual restrictions.⁷⁹⁹ Have the Community Courts abandoned economic freedom? This is unclear. Furthermore, if they have, what is the new standard? Is it economic efficiency, merely allocative efficiency, or something else? This is not clear either. In fact, the Community Courts' judgments are so hard to reconcile that they are probably still undecided as to what article 81(1)'s underlying principles should be. They have not consistently chosen one of market integration, economic freedom or efficiency (or some other notion).⁸⁰⁰ Instead, they hide behind the notion of factual and economic context, see Section 2.1.2. below, and have thus far avoided the issue.

Community competition law is a complex beast. It must be viewed in light of the Treaty as a whole. The relevant balance of Treaty objectives changes over time, Chapter Two. Perhaps the Treaty's drafters used a general concept, such as 'restriction of competition', to give the Community Courts more flexibility to change its content over time? Having said that, we are facing a somewhat different problem. As we have seen, it is not clear if certain objectives are relevant under article 81(1) of the Treaty (think of economic efficiency), or whether this has changed over time (is economic freedom still relevant?). There is also little consistency or clarity as to how the relevant objectives should be combined there. This is unsatisfactory.

This ambiguity gives the Commission (and the Member States' courts and competition authorities) an enormous amount of freedom.⁸⁰¹ Unsurprisingly, a clearer position has not emerged from them either.⁸⁰² Sometimes almost every restriction in agreements between

⁷⁹⁹ Possibly as a result of this realisation, in a later article discussing *Métropole télévision*, Odudu drops the reference to economic freedom (see above, alternative three), implying that a mere (appreciable) restriction of allocative efficiency is enough, Odudu (2002), pages 103-105. He does not explain this change.

⁸⁰⁰ Gerber (2001), page 124, for example, points to "...at least four basic conceptions of what it means to protect competition [in Community competition law]."

⁸⁰¹ The Commission's view is increasingly important, see Gerber (1998), pages 374 and 375 and Case 42/84 *Remia BV and Others v. Commission* [1985], paragraph 34.

⁸⁰² See, for example, Bright (1995), pages 506 and 507. One exception is the Office of Fair Trading in the United Kingdom. Their guidelines OFT, *Article 81 and the Chapter I Prohibition*, paragraph 2.22 state "Any agreement between undertakings might be said to restrict competition to some degree, in that it restricts the freedom of action of the parties. That does not, however, necessarily mean that the agreement has or will have an appreciable effect on competition, and the OFT does not adopt such a narrow approach. The OFT will assess the effect of an agreement on competition within the common market and/or within the United Kingdom or a part of it by examining an agreement in its economic context." This clearly cites economic freedom as the basis of the article 81(1) test (and the UK equivalent). That said, ambiguity is introduced through the application of this concept as a result of the Community Courts' insistence that the restriction be placed in context, see Section 2.1.2.

significant players requires an exemption.⁸⁰³ On other occasions the Commission interprets 'restrictions of competition' as '*undue* restrictions of economic freedom'.⁸⁰⁴ The Commission insists that an economic efficiency analysis should not be conducted under article 81(1) of the Treaty.⁸⁰⁵ That said, it too is inconsistent.⁸⁰⁶ Of late, the Commission has emphasised a 'new economic approach', see Chapter Two.⁸⁰⁷ Although the Commission distinguishes between the two, it is unclear how precisely the economic approach differs from an economic efficiency analysis, see Section 2.1.2. below. The Commission, *Article 81(3) Guidelines*, do not define 'competition' either.

This part has not sought to define what a 'restriction of competition' is. Instead, it shows that even in relation to the most recent caselaw, there remains significant disagreement on what it means. Unsurprisingly, it is also unclear what a restriction of competition *is not*. What does this mean? Not only does Monti assert that economic freedom is the basis for article 81(1); he also argues that 'restriction of competition' cannot be read as economic inefficiency, or even, allocative efficiency. As a result of *Métropole télévision*, paragraph 78 (and presumably paragraph 77, see below), Monti has said that:

⁸⁰³ "...the validity of an un-notified agreement was jeopardised as soon as it could be shown that it contained a provision restricting freedom of action.", Venit (2003), page 574. See also Verouden (2003), page 532; Lenaerts (2002), page 32; Fox (2001), page 127; Hawk and Denacijer (2001), page 129; Hawk (1995), page 975 and Waelbroeck (1987a), page 693.

⁸⁰⁴ See, for example, the Commission's arguments in Case 86/82 *Hasselblad v. Commission* [1984], paragraph 42, "The prohibition on cross-supplies restricts competition because it seriously impedes the economic freedom of authorised dealers and makes them wholly dependent." This reflects Commission decision, *Hasselblad*, paragraph 59. See also, Commission decision, *ACEC-Berliet*, paragraph II(1); Commission decision, *Woodpulp*, paragraph 133; Commission, *RCP 1991*, paragraph 83 and page 334 and the Commission's position in matters such as the *Coditel Case*, page 3389 "...typical restrictions on freedom of economic action..." and the *Nungesser Case*, pages 2035 and 2036.

⁸⁰⁵ See, for example, Commission, *White Paper on Modernisation*, paragraph 57. This also the implication of Commission, *Article 81(3) Guidelines*, paragraph 11.

⁸⁰⁶ See, for example, Commission decisions, *LH/SAS*, paragraphs 52-61; *Fenex*, paragraphs 59-64; *Banque Nationale de Paris/ Dresdner Bank*, paragraphs 15 and 16; *EATA; FETCSA*, here the Commission solely seems to focus on efficiency in article 81(1) of the Treaty, all the language is economics based, paragraphs 132-139 and Commission decision, *SAS Maersk Air etc.*, paragraph 72(a). See also, for example, Wesseling (2000), page 90. Also see, Commission, *RCP 1992*, page 19; Commission, *Vertical Guidelines*, paragraph 7 and Commission, *Horizontal Guidelines*, paragraphs 7, 19, 20, 24, 25 and 197. "Reading the *Annual Reports on Competition Policy* leads to the disappointing conclusion that the Commission actually has no definition at all or does not use its concept of competition in a consistent way. One finds: 'normal competition', 'undistorted competition', 'workable competition', 'effective competition', 'healthy competition', 'efficiency', 'real competition'; and these terms are all used in the general part of the Reports where the Commission reflects upon its own work.", Uitermark (1996), pages 6 and 7. See also, Bright (1995), page 506-513.

⁸⁰⁷ Perhaps this is intended to bring it in line with the Community Courts' jurisprudence? Many argued that their approaches differ. See, for example, van Gerven (2004), page 418; Verouden (2003), page 539; Hildebrand (2002), pages 187 and 207; Bishop (2001), page 56; Jones and Sufrin (2001), page 120; Anderman (1998), pages 92 and 93; Ehlermann (1998), pages 572 and 573; Hawk (1995), pages 982 and 983; Bright (1995), pages 506-509, 521 and 522; Waelbroeck (1987a), page 721 and Forrester in (1987) Fordham Corporate Law Institute, pages 726 and 727.

"...the neo-classical conceptions of competition play a role - if at all - only when deciding to exempt an agreement under article 81(3)."⁸⁰⁸

Note that this argument by Monti does not undermine the second possible interpretation of the CFI's judgment in *Métropole télévision*, see above.⁸⁰⁹ All it does is argue that a restriction of competition cannot be interpreted as economic efficiency.

Even here, one can legitimately question whether the CFI in *Métropole télévision* was unambiguous. The judgment says, paragraphs 77 (only the second part is relevant to this point, the first part of paragraph 77 is cited above) and 78:

"It must...be emphasised that such an approach [i.e. examining the agreement under the actual conditions in which it functions] does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in article 85(1) [now article 81(1)] of the Treaty applies.

In the light of the foregoing, it must be held that, contrary to the applicants' submission, in the contested decision the Commission correctly applied article 85(1) of the Treaty to the exclusivity clause and the clause relating to the special-interest channels inasmuch as it was not obliged to weigh the pro and anti-competitive aspects of those agreements outside the specific framework of article 85(3) [now article 81(3)] of the Treaty."

Weighing the pro and anti-competitive effects should take place, said the CFI, in article 81(3) of the Treaty. What does this mean? A similar statement in *Van den Bergh Foods* is equally opaque.⁸¹⁰ *Wouters* does not expressly consider this point, although some balancing occurs within article 81(1) in that case.

As a preliminary issue, one might question the precedent value of these two CFI cases, *Métropole télévision* and *Van den Bergh Foods*. First, as we discuss below, the relevant passages are unclear. Secondly, both cases were decided by only three judges, rather than the full court. It is unusual that the CFI would appoint three judges to decide upon, what Odudu rightly calls,⁸¹¹ "...the most controversial issue in EC competition law."⁸¹² Finally, the ECJ in

⁸⁰⁸ Monti (2002), page 1062.

⁸⁰⁹ That a restriction of competition is not a restriction of economic freedom. We saw above that Monti merely assumes that the Community Courts in *Wouters* and *Métropole télévision* are saying that a restriction of competition is a restriction of economic freedom. He does provide other arguments in favour of an Ordoliberal approach (discussed in Section 2.2. below), but these are not based on the caselaw.

⁸¹⁰ Case T-65/98, *Van den Bergh Foods Ltd. v. Commission* [2003], paragraph 107 "It is only within the specific framework of that provision [article 81(3)] that the pro and anti-competitive aspects of a restriction may be weighed..."

⁸¹¹ Odudu (2002), page 102 and Odudu (2001), page 261.

⁸¹² Tesouro, in Ehlermann (2001), page 300, a previous Advocate-General at the ECJ, argued, in relation to a different case, "I do not know if one judgment only can make caselaw. It is one judgment, only one. I have been reading the judgments of the European Court of Justice for many years now and I always tried to wait until there are three judgments on the same matter...otherwise there can be surprises." In the same book, page 305, David Edward, who has been a judge at both the CFI and ECJ, agreed with these comments. He added "Remember that, in order to determine who is to decide a case, the Court uses the following broad principles: (a) if the case raises a major issue

Wouters did not refer to *Métropole télévision*⁸¹³ and may overrule it.⁸¹⁴ While it is possible to distinguish the two cases, this can produce rather odd results.⁸¹⁵ Furthermore, given the controversy surrounding these issues, if Monti's interpretation were right, silence here is unusual. If *Métropole télévision* and *Van den Bergh Foods* are not good law, then the issues discussed in Section 2.1.2. are still relevant. They show that, although it is far from clear, in fact, it is hard to argue that the Community Courts have not weighed the agreement's pro and anti-competitive effects in article 81(1) of the Treaty.

Nevertheless, let's examine paragraphs 77 and 78 in a little more detail. At least two interpretations are possible. First, they may mean that the pro and anti-competitive considerations are balanced in article 81(3) *and are not considered in article 81(1) at all*. This must mean that something else (i.e. not competitive issues) is relevant in article 81(1) of the Treaty. For example, economic freedom? This is Monti's argument. However, it is not certain that this is the correct interpretation. Paragraphs 77 and 78 could equally be understood as saying that the anti-competitive effects should be assessed under article 81(1) and the pro-competitive effects balanced against them under article 81(3) of the Treaty. Manzini and Verouden make this point,⁸¹⁶ and it is essentially the argument that Odudu relies on.⁸¹⁷

First let's examine what Monti, Manzini and Odudu agree on. They assume that the CFI's references to 'pro and anti-competitive' are shorthand for welfare. It is not certain that they are right. Nowhere in *Métropole télévision* does the CFI refer to either 'welfare' or 'efficiency', let alone assimilate them to 'competitive'. The same can be said in relation to 'welfare' in *Van den Bergh Foods*. The CFI refers to efficiency there, but not so as to definitively answer this

of principle, it will be brought before the plenary; (b) if it is a simple question of technical interpretation, like...a simple question of applying existing jurisprudence, it goes to a chamber of three; and (c) in-between there is the chamber of five, whose basic assignment is that it may develop existing jurisprudence, but not create new jurisprudence."

⁸¹³ "The reader of the Court's judgments will be struck by the fact that previous decisions are often only cited by the Court where they support its argument. Authorities which point the other way are sometimes not mentioned at all...", Arnulf, Dashwood, Ross and Wyatt (2000), pages 201 and 202. Judgment in the *Van den Bergh Foods Case* was handed down after the *Wouters* judgment and Advocate-General Léger's Opinion in *Wouters* was written before the *Métropole télévision* judgment.

⁸¹⁴ Korah (2002), page 25, asks this rhetorically. For a contrary view see Manzini (2002), page 397.

⁸¹⁵ One could say, for example, that all objectives can be balanced within article 81(1) of the Treaty (*Wouters*) except analysis of the pro-competitive effects, or, possibly all of the efficiency analysis (*Métropole télévision*). Monti (2002), section 5.2. suggests another alternative, which Chapter Seven discusses.

⁸¹⁶ Manzini (2002), page 396 and Verouden (2003), pages 538-540, 565 and 566. See also, van Gerven (2004), pages 426 and 427.

⁸¹⁷ Odudu (2002), pages 103-105.

issue.⁸¹⁸ If Monti, Manzini and Odudu are wrong, then pro and anti-competitive effects may refer to non-welfare issues. If that were the case, then efficiency issues could be dealt with under article 81(1) after all.⁸¹⁹ Unfortunately, without access to the Report from the Hearing from either case, we cannot be more definitive on this issue.⁸²⁰

In any event, from this point on Monti, Manzini, Verouden and Odudu disagree. This is unsurprising as it is unclear where the line between pro and anti-competitive effects should be drawn.⁸²¹ Odudu believes that the CFI uses 'anti-competitive' to mean that the task demanded by article 81(1) is "...to determine whether the agreement has the object or effect of *allocative inefficiency*."⁸²² He argues that pro-competitive advantages (essentially productive efficiency⁸²³) should be considered in article 81(3) of the Treaty. Monti, remember, believes that any efficiency issues (be they gains or losses) should be dealt with under article 81(3) of the Treaty. Manzini does not expressly consider the point, but implies that anti-competitive is anything that undermines welfare and pro-competitive are things that enhance it. He implies that the former can be considered in article 81(1), the latter should be assessed under article 81(3) of the Treaty.⁸²⁴ Finally, Verouden argues that there is a European rule of reason and that this focuses:

"...primarily on the functioning of the producer's distribution system (regulating intrabrand competition), rather than on competition in the market place as such (promoting interbrand competition)."⁸²⁵

It is not necessarily relevant whether the authors are individually right or wrong. What is relevant is that even the recent jurisprudence is unclear. Furthermore, this lack of clarity is

⁸¹⁸ The word 'efficiency' appears four times in the judgment. It was always used to report arguments of the parties, as opposed to the CFI's thinking. Even then, it was used ambiguously, see paragraphs 120, 132, 140 and 148.

⁸¹⁹ If we also agree that Monti's interpretation of paragraphs 76 and 77 is wrong, i.e. that article 81(1) does not relate to restrictions on economic freedom, but something different.

⁸²⁰ The CFI's references to the rule of reason does not clarify the debate. There are many versions of the rule of reason, each balancing different things, Manzini (2002), footnote 24; Ehlermann (2001), page 134-137; Black (1997), page 145 and Hawk (1987), page 738. The CFI may have been referring to one of these and not the others. For example, it has been argued that in *Wouters* the ECJ conducted a rule of reason by putting the administration of justice into the balance, O'Loughlin (2003), pages 67 and 68.

⁸²¹ Bishop (2001), page 60.

⁸²² Odudu (2002), page 103.

⁸²³ Odudu describes pro-competitive effects as productive efficiency benefits, page 104. Presumably dynamic efficiency gains would also be included here. These terms are explained in Chapter One.

⁸²⁴ Manzini (2002), pages 395-397 and 399. See also, Lugard and Hancher (2004), page 411. I say 'implies' because Manzini argues that anti-competitive issues fall within article 81(1) and pro-competitive are considered in article 81(3). Therefore, it seems like he is discussing two sides of the same coin. However, in his conclusion, Manzini refers to "...restricting the freedom of action of one or more of the parties...", page 399.

⁸²⁵ Verouden (2003), page 540. Hildebrand (2002), pages 220 and 221, offers yet another test.

reflected by academics of some note writing in influential, peer-refereed, journals. Given this disagreement, it is hard to accept Odudu's view that:⁸²⁶

"In clear and explicit terms the Court of First Instance rejects the idea that *all* the economic assessment must take place under article 81(1)."

Indeed, it is difficult to agree that the CFI has been clear at all. One can argue that some of these alternatives are more likely than others, read in light of other Community Court cases, see below. But, in general, the lack of guiding principle from the Community Courts falls short of Mario Monti's view that companies can reasonably expect an adequate level of predictability and consistent application of the rules that allows them properly to assess how the rules will be applied.

This part has argued that the Community Courts and the Commission have not clearly and consistently defined the underlying principles of a 'restriction of competition'. Even in light of *Métropole télévision* and *Van den Bergh Foods* the matter remains unresolved. Such a definition is important because even though the Treaty places a lot of emphasis on 'competition' it is unclear what this means. Furthermore, the modernisation proposals:

"...appear to assume that the system's goals are well-defined and thus that those who will make decisions in the modified system can easily identify and follow them. The history of competition law in Europe suggests otherwise."⁸²⁷

Now, we turn to the way that article 81(1) is implemented in practice. We have seen that the restriction (whatever that is) should be placed in its economic context. What does this involve?

2.1.2 'restriction of competition' - the application

Even if Monti were right, that the recent caselaw supports his Ordoliberal approach,⁸²⁸ we are confronted with a second problem. That this approach, as applied by the Commission and the Community Courts, is unworkable in practice. A restriction on economic freedom is a restriction on individual economic freedom of action.⁸²⁹ But, as we saw above, the ECJ has held that not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in article 81(1) of the Treaty.

So, not all restrictions on economic freedom are relevant. This is logical. If all restrictions on individual economic freedom fell within article 81(1) of the Treaty then the net would be spread too wide. As Neale and Goyder point out:

⁸²⁶ Odudu (2002), page 103.

⁸²⁷ Gerber (2001), page 125.

⁸²⁸ And Section 2.1.2. assumes that he is, despite our scepticism.

"There is a sense in which any one bargain excludes others; when a bargain is sealed, the competition for that particular portion of trade is at an end. It would be a *reductio ad absurdum* to call trade itself restraint of trade; yet some types of bargain may preclude a great deal of potential competition."⁸³⁰

This is why Monti says there must be an *undue* restriction of economic freedom. But, the problem lies in the detail. If not every restriction of economic freedom is a restriction of competition how can we decide when they are or when they are not? What mechanisms have been used to help define the economic freedom concept? As we saw in *Métropole télévision*, the CFI said:

"...account should be taken of the actual conditions in which it [the agreement] functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned..."

This is not a novel statement in Community competition law. But, what does the CFI mean when it says that account should be taken of the economic context? Is this a reference to economic efficiency? Maybe not. As we have seen, at paragraph 77, the CFI emphasised that examining the agreement under the actual conditions in which it functions does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in article 81(1) of the Treaty applies. Monti argues that this confines economic efficiency to article 81(3) of the Treaty. Taking this extreme assumption as our starting point, how easy are the rules in *Métropole télévision* to apply?

We know that some restrictions on economic freedom, but not all, are bad. How do we differentiate between good and bad? If the economic efficiency of the agreement is not relevant, what are the Community Courts referring to when they underline the importance of the overall context in which the agreement operates? Can the caselaw help us?

As mentioned above, the *Métropole télévision* case was an appeal from Commission decision, *TPS*. For the purposes of our discussion the Commission focused on two clauses within the TPS agreement. The first related to a clause concerning programmes and services requiring that the parties give TPS first refusal in respect of all the special-interest channels and television services they operate or over which they have effective control. The parties also undertook to give TPS final refusal or acceptance on the best market conditions in respect of any programmes or services which they offer to third parties, with TPS having the option of carrying these channels and services on an exclusive or a non-exclusive basis. The Commission found, paragraph 101, that while the obligation on the members to give TPS first refusal over their special interest channels might have been ancillary to the launch of the platform:

⁸²⁹ Möschel (1989), page 146.

"...this obligation, which is imposed for a period of ten years, nevertheless results in a limitation of the supply of special-interest channels and television services. In this respect, the clause in question falls within the scope of article 85(1) [now article 81(1)]."

The second clause of interest to us was a provision concerning the exclusive transmission of the general-interest channels (TF1, France 2, France 3 and M6) by TPS. This granted TPS the exclusive right to broadcast the general-interest channels by satellite (although they would also be transmitted by cable), paragraph 102. These television channels typically attract the largest audiences in France, some 90% of all viewers, paragraph 103. There is a potential demand for the transmission of these programmes in digital form as nearly half of all French homes with a television set were located in areas of poor reception, paragraph 104. The Commission said that access to these channels was "...undeniably important and attractive to viewers, to the sole benefit of TPS.", paragraph 106. The Commission found that article 81(1) of the Treaty would apply to this clause, paragraph 108, because, paragraph 107:

"The exclusive right to broadcast the four channels concerned for the duration of the agreements, namely 10 years, albeit limited to encrypted satellite transmission in digital mode, does constitute a restriction of competition since it denies TPS's competitors access to attractive programmes."

Before the CFI the applicants argued that article 81(1) of the Treaty had been misapplied because the Commission had not used the rule of reason. They lost this point. The CFI concluded, paragraphs 78 and 79:

"...in the contested decision the Commission correctly applied article 85(1) [now article 81(1)] of the Treaty to the exclusivity clause and the clause relating to the special-interest channels...

It did...assess the restrictive nature of those clauses in their economic and legal context in accordance with the caselaw. Thus, it rightly found that the general-interest channels presented programmes that were attractive for subscribers to a pay TV company and that the effect of the exclusivity clause was to deny TPS's competitors access to such programmes (points 102 to 107 of the contested decision). As regards the clause relating to the special interest channels, the Commission found that it resulted in a limitation of the supply of such channels on that market for a period of 10 years (point 101 of the contested decision)."

Here then are two examples, according to the CFI, of the Commission putting restrictive clauses in their economic and legal context. In relation to the general-interest channels the Commission had said that the channels in question were both attractive for subscribers and that the exclusivity clause would deny TPS's competitors access to such programmes.

⁸³⁰ Neale and Goyder (1981), page 25. See also, Case 42/84 *Remia v. Commission* [1985], paragraphs 18 and 19.

But what does this analysis amount to? Not much. First, the Commission did not discuss why this clause had been adopted, presumably to make the chances of entry more successful (this too is economic freedom). This meant that it could not, and did not, examine this clause's effect in light of the legal and economic context. It just focused on the immediate result and ignored the underlying point of the exercise.

Secondly, the Commission said that these programmes were popular; this is not surprising as they include the most established French channels. It added that there was a lot of potential demand. The relevance of the demand point is not clear as it is used in a static way - i.e. there is a problem, poor reception in many homes, which may mean that more people might want access to such programmes. The Commission provides evidence that some people have subscribed to TPS because of these channels, it did not provide evidence to say that more were likely to switch now. It also said that such channels were not essential, as the two other digital bouquets had been launched without them. The Commission did not look at the potential for others to provide equally attractive general-interest channels.

In relation to the second clause the argumentation is even less thorough. The Commission fails to consider the reason for the clause. The Commission merely noted that TPS got first refusal for a period of ten years. It goes on to say that this "...results in limitation of the supply of special-interest channels...", paragraph 101, and thus falls within article 81(1) of the Treaty. No attempt is made to place this in any economic context. The Commission has done no more than point out that there is a restriction of economic freedom.

The reasoning and conclusions of the *Métropole télévision* case are unsatisfactory. The CFI says that merely pointing out that there is a restriction of economic freedom is not enough. It says that the Commission must also examine the legal and economic context of the clauses in question. But how, and in relation to what? Furthermore, in relation to the special-interest channel clause the CFI supported the Commission for essentially doing no more than remark that there was a restriction of economic freedom. In relation to the general-interest channel clause the Commission does slightly more work but does not provide a thorough or convincing economic context to support its conclusions that the restriction on economic freedom is important.

As we saw above, in *Métropole télévision* the CFI cited seven other cases which it argued were part of the broader trend in the caselaw that account should be taken of the actual conditions in which the agreement functions. We examine three of them below.⁸³¹ They are the *Gottrup-Klim*

⁸³¹ I have already discussed the effect of market integration on article 81(1) in Chapter Three. The presence of market integration issues complicates the analysis and Case 56/65 *Société Technique Minière v. Maschinenbau Ulm* [1966]; the *Nungesser* Case and the *Pronuptia* Case fall into this category. The *Coditel* Case was also discussed in Chapter Three. Having said that, analysis of these cases would not reveal any clearer guidelines. For example, the

Case; Case C-399/93 *H.G. Oude Luttikhuis and Others v. Verenigde Coöperatieve* [1995] and the *European Night Services* Case. However, the examination of these cases further obscures the CFI's judgment in *Métropole télévision*. The CFI cites them to show that there is no balancing of pro and anti-competitive elements under article 81(1) of the Treaty. On the assumption that pro and anti-competitive relates to welfare (which is unclear, see above), these cases seem to show quite the opposite.

Gøttrup-Klim concerned an action between 37 Danish co-operative associations specialising in the distribution of farm supplies and DLG (the Danish co-operative association distributing farm supplies). The case concerned the lawfulness of a change that DLG made to its statutes, excluding the plaintiffs from DLG because they were members of another organised co-operation, which was in direct competition with it. The national court, in an article 234 reference, sought to ascertain whether a provision in the statutes of a co-operative purchasing association, the effect of which is to forbid its members to participate in other forms of organised co-operation, which are in direct competition with it, is caught by the prohibition in article 81(1) of the Treaty.

The ECJ noted that co-operative purchasing associations are voluntary associations established in order to pursue common commercial objectives, paragraph 30. The compatibility of DLG's statutes with the Community rules, said the ECJ, cannot be assessed in the abstract. One must look at, paragraph 31, "...the particular clauses in the statutes and the economic conditions prevailing on the markets concerned." The ECJ continued, paragraph 32:

"In a market where product prices vary according to the volume of orders, the activities of co-operative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition."

If some members could belong to two co-operatives at the same time then the proper functioning of the co-operative could be jeopardised, as could its contractual power vis-à-vis producers. As a result, the prohibition of competition did not necessarily constitute a restriction on competition, paragraph 34. Finally, the ECJ concluded the issue, paragraph 35:

"Nevertheless, a provision in the statutes of a co-operative purchasing association, restricting the opportunity for members to join other types of competing co-operatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in article 85(1) [now article 81(1)] of the Treaty, the restrictions imposed on members by the statutes of co-operative

Commission cited two of these cases, the *Nungesser* Case and the *Pronuptia* Case as examples of the ECJ applying the rule of reason under article 81(1) of the Treaty, Commission, *White Paper on Modernisation*, paragraph 57, footnote 47. The CFI cites them in *Métropole télévision* to show the opposite.

purchasing associations must be limited to what is necessary to ensure that the co-operative functions properly and maintains its contractual power in relation to producers."

The ECJ accepts that a provision restricting the opportunity of members from joining other co-operatives restricts competition (i.e. may be anti-competitive). However, this is not enough. The ECJ goes on to say that co-operatives of this kind provide a significant counter-weight to producers and thus "...make way for more effective competition.", paragraph 32 (i.e. are pro-competitive). It 'suggests' that the Danish court accept the "prohibition on competition", paragraph 34, or at least accept it to the extent that it is necessary to ensure that this contractual power, (which leads to more effective competition) is maintained, paragraph 35. It is difficult to see this exercise as anything other than an assessment of the pro and anti-competitive effects of the statutes' new rule.⁸³² In the event that the ECJ is not undertaking such a balancing exercise, which is certainly possible as the judgment is somewhat obscure, it provides little guidance of what the test is and how it relates to economic freedom.

The same issue arises in Case C-399/93 *H.G. Oude Luttikhuis and Others v. Verenigde Coöperatieve* [1995], another of the cases cited by the CFI in *Métropole télévision*. Mr Luttikhuis and eight other dairy farmers (the applicants) were members of the Verenigde Coöperatieve (the respondent), a Dutch co-operative association for processing milk and other dairy products and for selling those products. The respondent undertook to buy all the milk its members produced, and in return, its members gave it an exclusive right to buy their milk. The dispute arose because of a fee which the respondent's statutes held was payable when the applicants decided to withdraw from the co-operative. The applicants argued that both this fee and the exclusive sales obligation breached article 81(1) of the Treaty. The ECJ held that organising an undertaking in the form of a co-operative does not necessarily fall within article 81(1) of the Treaty. Indeed, held the ECJ, co-operatives are, paragraph 12:

"...favoured both by national legislators and by the Community authorities because it encourages modernisation and rationalisation in the agricultural sector and improves efficiency."

That said, certain provisions in their statutes may fall within article 81(1), paragraph 13. The ECJ continued, paragraph 14:

"In order to escape that prohibition, the restrictions imposed on members by the statutes of cooperative associations intended to secure their loyalty must be limited to what is necessary to ensure that the cooperative functions properly and in particular to ensure that it has a sufficiently wide commercial base and a certain stability in its membership (see Case C-250/92 *Gottrup-Klim v Dansk Landbrugs Grovvarereselskab* [1994] ECR I-5641, paragraph 35)."

⁸³² See also, Bolze (1995), pages 555 and 556 "La cour utilise une méthode qui s'apparente à la *rule of reason* du droit antitrust américain pour évaluer concrètement l'impact du comportement dénoncé..."

The ECJ's judgment reflects Advocate-General Tesau's Opinion, paragraph 30.⁸³³ What is the underlying logic? One interpretation is that co-operatives are favoured because they can be pro-competitive. The ECJ explicitly refers to the fact that they encourage modernisation and rationalisation in the agricultural sector and improve efficiency. Note that these are a mixture of allocative, productive and dynamic efficiency gains.⁸³⁴ Restrictions imposed on the members (i.e. anti-competitive clauses) are acceptable insofar as, in fact, they are necessary to ensure the co-operative functions properly.⁸³⁵ In other words, we balance the agreement's pro and anti-competitive effects on the market, in order to assess whether the 'restriction' can 'escape' article 81(1) of the Treaty. Or, as stated in Advocate-General Tesau's Opinion, paragraph 31:

"It is therefore in the light of the circumstances and actual operating conditions of the market concerned that the *overall effect of competition* on those clauses must be examined.
[my emphasis]"

The test proposed by the ECJ here, as well as Advocate-General Tesau, resembles a rule of reason analysis, where the agreement's pro and anti-competitive (welfare) effects are balanced against each other.⁸³⁶ This happened within article 81(1) of the Treaty.

Finally, in the *European Night Services* Case the CFI examined a Commission decision in relation to an application by ENS that Regulation 1017/68 did not apply to some agreements concerning the carriage of passengers by rail through the Channel Tunnel or, failing that, exemption of the agreement. The case is extremely long and complex. However, for our purposes it is only relevant that the Commission had found that the agreements restricted competition between the parent undertakings in the relevant joint venture, between the parent undertakings and ENS and also vis-à-vis third parties. The CFI said, paragraph 136 that:

"...it must be borne in mind that in assessing an agreement under article 85(1) [now article 81(1)] of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (judgments in *Delimitis*, cited above, *Gotttrup-Klim*, cited above, paragraph 31, Case C-

⁸³³ Ackermann (1997), pages 701 and 702.

⁸³⁴ We saw Odudu arguing that some economic analysis is still necessary, post *Métropole*, but that this should be restricted to allocative efficiency arguments, with productive and dynamic efficiency issues being raised within article 81(3) of the Treaty, Odudu (2002), pages 103-105 and Odudu (2002a). This judgment may undermine Odudu's argument, see also, in particular, the arguments of the German Government, in the *Nungesser* Case, paragraph 55.

⁸³⁵ The ECJ explained, paragraphs 15 and 16, why these clauses might, in fact, be anti-competitive. This was for the Member State court to establish as it was an article 234 reference.

⁸³⁶ This is the position adopted by a lot of the doctrine in its commentary of the case, see Ackermann (1997), pages 704-707, "The European rulings on restrictive clauses in statutes of co-operatives fit this [a rule of reason] analysis."; Vogel (1997), pages 130 and 131, "La CJCE invite en réalité à faire application d'une règle de raison..." and Bolzè (1996), pages 586 and 587, "La doctrine a estimé qu'il s'agissait là de l'utilisation par le juge de la règle de raison..."

399/93 *Oude Luttikhuis and Others v Verenigde Coöperatieve Melkindustrie* [1995] ECR I-4515, paragraph 10, and Case T-77/94 *VGB and Others v Commission* [1997] ECR II-759, paragraph 140), unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, paragraph 109). In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in article 85(1)."

The CFI distinguishes between restrictions by their object and effect. In relation to an analysis of the effect of allegedly restrictive clauses the CFI held that they should be examined in the context in which they function. This is what the CFI says in *Métropole télévision*, see above. Then, in *ENS*, the CFI explains that where a restriction is, by its object restrictive, pro-competitive elements can be taken into account only in article 81(3) of the Treaty. Although it is not explicit, the implication is that where this is not the case, pro-competitive elements may be considered under article 81(1).⁸³⁷ This interpretation is certainly debateable. What is certain is that the test under article 81(1) of the Treaty is far from clear. Or, in Venit's words:⁸³⁸

"...most practitioners would agree that, under the test adopted by the CFI in *Night Services*,⁸³⁹ the analysis under article 81(1) is fraught with at least as many, if not more, uncertainties as the analysis under article 81(3)..."

In conclusion, in *Métropole télévision*, the CFI holds that a mere restriction of competition is not enough. While the agreement's pro-competitive effects cannot be balanced against its anti-competitive effects within article 81(1) of the Treaty, it should be examined within its actual context in order to see whether it restricts competition. The CFI cites seven cases to support its argument. Some appear to distinguish between an economic approach and economic efficiency analysis.⁸⁴⁰ However, Verouden believes that the exercise of assessing the agreement in its economic context entails "...some balancing of pro and anti-competitive effects."⁸⁴¹

Indeed, one might argue that by differentiating between a 'rule of reason' and an 'economic approach' we are getting dangerously close to pure semantics.⁸⁴² This is nicely illustrated by the concluding discussion at the Fordham Corporate Law Institute in 1987. At one point Professor

⁸³⁷ Bishop and Walker (2002), page 139 and Faull and Nikpay (1999), paragraphs 2.97 and 2.98. This is also the implication of the discussion in Hawk and Denaeijer (2001), page 131, for example. For a contrary view see Goyder (2003), page 93 and (possibly) Jones and Sufrin (2001), page 154, although note their page 189.

⁸³⁸ Venit (2003), page 561.

⁸³⁹ Here Venit cites paragraph 136 of the *European Night Services Case*.

⁸⁴⁰ Schaub, A., in Ehlermann (2001), pages 243 and 257, for example, seems to do this, although he does not explain how the two are different.

⁸⁴¹ Verouden (2003), page 539.

⁸⁴² "Obviously, there is still much opposition to the notion of a 'rule of reason'. It is therefore frequently argued that those cases which could be interpreted as instances of such a 'rule of reason' are either exceptions to the rule or can be explained in terms of [a] mere 'economic' reading of article 85 [now article 81]. However, it would seem that we are thus getting dangerously close to pure semantics." van Empel (1988), page 23.

Hawk (a US academic) and Mr Schröter (then a Commission official) are discussing Commission decision, *SAFCO*. Mr Schröter claims to apply the Community Courts' caselaw (the economic context approach) when finding that the restriction of economic freedom in that case should not have fallen within article 81(1) of the Treaty.⁸⁴³ Professor Hawk replied:

"...let me suggest that your reading of *SAFCO* is the US rule of reason; you just applied it...The chief characteristic of the rule of reason...is its requirement of an enquiry into the actual pro-competitive and anti-competitive effects of the arrangement at issue."⁸⁴⁴

Section 2.1.1. argued that the underlying *principles* of article 81(1)'s test are far from clear. Section 2.1.2. has argued that the *application* of the caselaw in article 81(1) also lacks clarity on many levels:

- First, the CFI in *Métropole télévision* seems to undermine its own insistence that the context is relevant by refusing to annul the underlying Commission decision, even though it found a restriction of competition as a result of a mere restriction of economic freedom;
- Secondly, the CFI in *Métropole télévision* argues that examining an agreement in its economic context is not the same as weighing the agreement's pro and anti-competitive in article 81(1), and yet:
 - if placing the agreement in its economic context is different from conducting a rule of reason, then it is unclear exactly what placing the agreement in its context means. See the discussion of the *European Night Services Case* above;⁸⁴⁵ and,
 - much of the doctrine makes exactly the opposite point. See the *Gottrup-Klim Case* and Case C-399/93 *H.G. Oude Luttikhuis and Others v. Verenigde Coöperatieve* [1995], discussed above.⁸⁴⁶

⁸⁴³ Schröter, H., in (1987) Fordham Corporate Law Institute, pages 736 and 737.

⁸⁴⁴ Hawk, B., in (1987) Fordham Corporate Law Institute, page 738.

⁸⁴⁵ When discussing the remit of article 81(1) of the Treaty in Commission, *Article 81(3) Guidelines*, the Commission uses similar language to the CFI in *Métropole télévision*. It is equally unclear. The Commission said, "For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability...Such negative effects must be appreciable.", Commission, *Article 81(3) Guidelines*, paragraph 24. These seem to be economic efficiency criteria.

⁸⁴⁶ Similar points have also been made in relation to the other four cases that the CFI refers to in *Métropole télévision*, paragraph 75. See the articles cited in relation to the possible existence of an economic efficiency element to article 81(1) of the Treaty, in Section 2.1.1. above. See also the Opinion of Advocate-General Léger in *Wouters*. At paragraph 102 he says "...the Court has made limited application of the 'rule of reason' in some judgments. Confronted with certain classes of agreement...it has drawn up a competition balance sheet and, where the balance

2.1.3 Conclusion of Section 2.1.

Section 2.1. was not designed to argue what is meant by a 'restriction of competition' under article 81(1) of the Treaty. It merely sought to show that considerable disagreement (although not total uncertainty⁸⁴⁷) remains as to what this phrase means. This can be found in the Community Courts' caselaw, in Commission decisions as well as between eminent Community competition law scholars.⁸⁴⁸ This remains the case today, despite the Commission's recent attempt to clarify the law.⁸⁴⁹

In many ways the lack of clarity is unsurprising. 'Restriction of competition' is not defined in the Treaty. Its content is not self-evident and needs to be fleshed out in the caselaw. This is not easy either. Remember that the provision must be viewed in light of the Treaty as a whole and that the relevant objectives themselves have often not been clearly developed. They also conflict and change over time. In addition, the creation of the CFI necessarily reduces the ECJ's control over developments in the system. "No longer is there one judicial voice; there are two." Furthermore, the Commission's growing power, authority and confidence contributes to the erosion of the leadership that the ECJ has shown in the past.⁸⁵⁰ This is not even to mention the Member States' courts and competition authorities.

That said, it is simply unacceptable that article 81(1)'s underlying principles, as well as the methodology for applying the provision in practice, remain so opaque. While these might change over time, clear rules could still be produced as and when these changes occur. These could then be applied more consistently, openly and transparently by all relevant decision-makers. In the words of Black:

"It remains a scandal of competition law on both sides of the Atlantic that there is no consensus as to the kind of competition the law is intended to promote: different decisions give precedence to different kinds."⁸⁵¹

As a result, Sections 2.2. and 2.3. discuss how a 'restriction of competition', for the purposes of article 81(1) of the Treaty, should now be defined. As stated above, the 'right' definition must

is positive, has held that the clauses necessary to perform the agreement fell outside the prohibition laid down by article 85(1) [now article 81(1)] of the Treaty."

⁸⁴⁷ van Gerven (2004), page 419.

⁸⁴⁸ Further to the references given above, see, for example, van Gerven (2004), pages 418 and 419; Whish and Sufrin (2000), page 146; Ehlermann (1998), pages 474 (Schaub); 490 (Whish) and 499 (Whish summarising the views of the conference's participants).

⁸⁴⁹ In Commission, *Article 81(3) Guidelines*. See van Gerven (2004), page 422. He is commenting on the draft guidelines, but they remain largely unchanged in this regard.

⁸⁵⁰ Gerber (1998), page 375. See also pages 388 and 389.

⁸⁵¹ Black (1997), page 146.

combine the need for legal certainty with the flexibility required for governing an economy in a state of constant flux. The definition must also take proper account of the Treaty's overall aims. Section 2.2. considers basing article 81(1) upon an economic freedom approach. But, ultimately, Section 2.3. concludes that an economic efficiency approach would be more appropriate.

2.2 Economic Freedom?

The Ordoliberal School has had a profound influence on Community competition law.⁸⁵² We have seen that a 'restriction of competition' has sometimes been interpreted as a restriction of economic freedom. Many argue that the Ordoliberal School's cornerstone, the protection of economic freedom, should continue to form the basis of the article 81(1) test. We investigate the pros and the cons of this assertion in Sections 2.2.1. and 2.2.2. respectively. Before doing so we briefly discuss the origins of the Ordoliberal school and what it stands for.⁸⁵³

Just as the National Socialists were taking power in Germany in 1933, three academics met at the University of Freiburg in Germany and discovered that they had similar readings of the failings of Weimar and similar views of what to do about it.⁸⁵⁴ They believed that the lack of a dependable legal framework had led to the economic and political disintegration of Germany. In their view, the core of the problem lay in the inability of the legal system to prevent the creation and misuse of private economic power.⁸⁵⁵

The Freiburg school followed earlier conceptions of liberalism in considering a competitive economic system necessary for a prosperous, free and equitable society. They were convinced that such a society could only develop once the market was embedded in a constitutional framework.⁸⁵⁶ This framework⁸⁵⁷ was designed to structure the relationship between the government and the individual along clear lines. It determines the kind of economic order the state is committed to pursue, and establishes a system of principles which binds economic policy. For the Ordoliberals it was not enough to protect the individual from the power of

⁸⁵² See, for example, the references to freedom in Commission, *RCP 1971*, page 11; Commission, *RCP 1985*, page 11; Verouden (2003), page 534 and 538; Monti (2002), page 1060; Hildebrand (2002), pages 159 and 165; Gerber (2001), page 123 and Möschel (1989), page 142. For example, Gerber (1998), page 343, argues that the German negotiators of the Treaty were imbued with the Ordoliberal orthodoxies. Furthermore, Walter Hallstein, the first President of the Commission and Hans von der Groeben, one of the drafters of the Spaak Report and the first Commissioner for DG Competition are both associated with the Freiburg school, Verouden (2003), page 535 and Hildebrand (2002), page 161.

⁸⁵³ For a more detailed analysis of the origins and views of this school see, Gerber (1998); Möschel (1989); Peacock and Willgerodt (1989) and Peacock and Willgerodt (1989a) and the references made there. The brief account provided here relies heavily on these sources.

⁸⁵⁴ Gerber (1998), page 233.

⁸⁵⁵ Hildebrand (2002), page 158 and Gerber (1998), page 235.

⁸⁵⁶ Verouden (2003), page 535; Gerber (1998), page 232 and Möschel (1989), page 154.

⁸⁵⁷ Which would include a property rights system, a monetary system, the organisation of markets, freedom of contract, etc., Möschel (1989), page 154.

government. Remember, governments were not the only threat to individual freedom. They thought that private economic power had helped to destroy the social and political institutions during the Weimar period. They emphasised the need to protect society from the misuse of such power.⁸⁵⁸ In other words, Ordoliberals considered a coherent legal framework as essential to guarantee individual freedoms and economic progress.⁸⁵⁹

As a result, the Ordoliberals focused on the role of the economy in society. To them, the essence of the transaction economy was economic competition, as this allowed the system to function effectively. Economic competition meant a system in which no firm in a market was able to coerce conduct by other firms in that market.⁸⁶⁰ The Ordoliberals embedded competition policy in the economic order of the free and open society. A strong state was needed to ensure economic actors played by the rules. Legal principles dealt with the acquisition and exercise of economic power.⁸⁶¹ This was in order to prevent those with private economic power from destroying the basis of private autonomy and ultimately jeopardising political liberties (economic power, they felt, had a tendency to turn into political power).⁸⁶² The state had to provide a basic level of legal security by assuring that the law was knowable, dependable and not subject to manipulation.⁸⁶³

In brief, competition policy was the cornerstone of the economic constitution. The goal of this Ordo-liberal competition policy lies in the protection of individual economic freedom of action as a value in itself, or vice versa, the restraint of undue economic power. Economic efficiency, as a generic term for growth, was but an indirect and derived goal.⁸⁶⁴

2.2.1 In favour of economic freedom

So, in theory, an economic freedom standard within article 81 of the Treaty could have important benefits. Four reasons are normally given for favouring the Ordoliberal definition of a restriction of competition within *article 81(1)* of the Treaty. First, there is the historical argument, that the economic freedom concept is what influenced the drafting of article 81. Secondly, some argue that the Ordoliberal definition conforms most closely with the structure of

⁸⁵⁸ Gerber (1998), page 240.

⁸⁵⁹ Sauter (1998), page 46.

⁸⁶⁰ Hildebrand (2000), pages 158 and 159; Gerber (1998), pages 244 and 245 and Möschel (1989), footnote 16.

⁸⁶¹ Hildebrand (2000), page 158.

⁸⁶² Gerber (1998), pages 250 and 251; Amato (1997), pages 2 and 3 and Möschel (1989), pages 151 and 152.

⁸⁶³ Gerber (1998), page 248.

⁸⁶⁴ Gerber (1998), page 251 and Möschel (1989), page 146.

article 81. Thirdly, there is a procedural argument. Finally, there is the 'constitutional' argument.⁸⁶⁵ We examine each of these in turn.

(a) The historical argument

Monti refers to the historical argument "...Ordoliberal ideas influenced the drafting of the competition provisions in the EC Treaty."⁸⁶⁶ For example, Gerber argues that the German negotiators of the Treaty were imbued with the Ordoliberal orthodoxies⁸⁶⁷ and Möschel points to the structural similarity between article 81 and the German Ordoliberal competition rules.⁸⁶⁸

Even on the assumption that Ordoliberal ideas were influential in this way,⁸⁶⁹ it does not mean that the concept of a 'restriction of competition', for the purposes of article 81(1) of the Treaty, should be interpreted in line with Ordoliberal thinking. The Community Courts are the interpreters of the Treaty and its limits.⁸⁷⁰ They prefer a teleological approach, based on an interpretation of the Treaty's *current* objectives, Chapter Two; and rarely adopt a historical-purposive approach to the interpretation of the Treaty, even when the drafters' intention is clear (which it is not here). For example, in one case, Belgium invoked an argument based upon the Member States' intention at the time the Treaty was drafted. The ECJ ignored the argument but the Commission summed up the position by saying:

"As historical interpretation plays hardly any part in Community law it would be futile to refer to the intentions of the authors of the Treaty..."⁸⁷¹

⁸⁶⁵ In order to justify the use of economic freedom within article 81(1), it is sometimes also argued that somehow the 'European way' is different and we demand fairness on top of efficiency. See, for example, Commission, *RCP 1979*, pages 9 and 10 and Commission, *RCP 1985*, page 11. Specifically what is meant by fairness is rarely articulated, Korah (2000), page 11. Furthermore, one might ask, even if this point is right on its face, whether distorting competition policy is the best way of achieving such an end. There are many other, more efficient, ways of implementing notions of fairness. See, Motta (2004), pages 24-26 and Townley (2002). In any event, fairness and economic efficiency do not always conflict, Motta (2004), page 26.

⁸⁶⁶ Monti (2002), page 1060. Although he acknowledges, on the same page, that article 81 "...is not a replica of Ordoliberal thought, but its structure bears the imprint of this political philosophy."

⁸⁶⁷ Gerber (1998), page 343 and Gerber (1994a), page 73.

⁸⁶⁸ Möschel (1989), page 150.

⁸⁶⁹ Though important in Germany, the prevalence of economic freedom was not universally accepted even there. For example, in the *Consten and Grundig Case*, page 342, the German Government argued that the Commission, "...before declaring article 85(1) [now article 81(1)] to be applicable, should, by basing itself upon the 'rule of reason', have considered the economic effects of the disputed contract upon competition between the different makes."

⁸⁷⁰ Article 220 of the Treaty. See also, Craig and de Búrca (1998), page 88.

⁸⁷¹ Case 149/79, *Commission v. Belgium* [1980], page 3890. See also the Opinion of Advocate-General Mayras in Case 2/74, *Jean Reyners v. Belgium* [1974], pages 665 and 666 and Craig and de Búrca (1998), page 89. Similar arguments were raised by the parties in relation to the notion of 'agreement' in article 81(1) of the Treaty, see Case T-1/89 *Rhône-Poulenc SA v. Commission* [1991], page 928. Advocate-General Vesterdorf did not support their plea, pages 928 and 929 and, once again, the CFI ignored the historical argument, paragraph 121. See also, Forrester, I., in Ehlermann (2001), page 78.

Marenco argues that it would be dangerous to ignore the history of the competition provisions.⁸⁷² In this case, it would be dangerous not to. There are three reasons why we should not adopt a historical approach in the interpretation of article 81(1) of the Treaty. First, the Treaty's *travaux préparatoires* were deliberately never published.⁸⁷³ This means that they are not a source that can be used and we cannot be sure what these wishes were (or even if they conflicted). It also implies that a historical interpretation is contrary to the founders' wishes. Secondly, as noted above, 'restriction of competition' is an open concept. It does not necessarily relate to economic freedom. American antitrust scholars also influenced the drafting of the ECSC Treaty's and the German competition provisions, upon which article 81 is based.⁸⁷⁴ 'Restriction of competition' could equally refer to efficiency criteria. If the 'founding fathers' intended to incorporate the economic freedom concept into article 81(1) why didn't they do so explicitly? Presumably, this was either because they were not so singularly motivated by this aim; or, they thought that such an objective was too controversial to be mentioned explicitly. Perhaps, as noted above, although it was influential, there was not a clear consensus that economic freedom should form the basis of the Community competition provisions. Remember that in 1958 the Member States told the United Kingdom that it was for the ECJ to interpret articles 81 and 82, see above. Finally, the continuous process of integration, and the transition from the 'European Economic Community' to the 'European Community', reduces the relevance of the Member States' original intentions in 1957.⁸⁷⁵ The Treaty and its objectives have fundamentally changed.⁸⁷⁶ The competition provisions must follow, Chapter Two.

In light of these arguments, the historical argument is unpersuasive.

(b) The structural argument

What about the structural argument? This is really a negative kind of argument. The point being that economic efficiency cannot be the relevant criterion under article 81(1), so economic freedom must be. This ignores the fact that other criteria might be relevant under article 81(1), see Section 2.1. But, even if we take the argument at face value, does it work? The CFI, in cases such as *Métropole télévision*, paragraph 74, suggests it might:

"Article 85 [now article 81] of the Treaty expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions...It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed...Article 85(3) of the Treaty would

⁸⁷² Marenco (1999), page 1244.

⁸⁷³ Craig and de Búrca (1998), page 89.

⁸⁷⁴ Jones (2004), page 12; Goyder (2003), page 21; Marenco (1999), pages 1220-1229 and 1238; Gerber (1998), pages 337-342; Gerber (1987), page 86 and Graupner (1965), pages 8 and 9.

⁸⁷⁵ Lenz (2000), page 37, citing Ackermann (1997a), page 59.

⁸⁷⁶ Weiler (1991).

lose much of its effectiveness if such an examination had to be carried out already under article 85(1) of the Treaty."⁸⁷⁷

Why do they think that? Monti explains why:

"From a neo-classical perspective, the inclusion of article 81(3) makes no economic sense: if an agreement's anticompetitive harms are outweighed by its pro-competitive benefits, then the agreement does not restrict competition at all. Conversely if an agreement's pro-competitive effects (for example in terms of productive efficiency) are outweighed by the risks generated by too much market power (which would reduce consumer welfare) then the agreement as a whole is anticompetitive. Therefore, article 81(3) is futile – an agreement either promotes competition (and is thereby lawful) or suppresses competition (and is thereby unlawful) – the weighing of the pro and anti competitive aspects of an agreement can be carried out under the first paragraph of article 81...Accordingly, the neo-classical definition of competition does not fit within the structure of article 81..."⁸⁷⁸

The Commission has argued that casting aside article 81(3) of the Treaty in this way is impossible without a change in the Treaty. It added that it would be paradoxical to introduce a rule of reason into article 81(1) of the Treaty because article 81(3) contains all the elements of a rule of reason. It would be dangerous to do this without the backing of the Community Courts. It would also divert article 81(3) of the Treaty from its true purpose, which is:

"...to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations."⁸⁷⁹

If a full economic efficiency test were carried out under article 81(1) of the Treaty, would article 81(3) lose much of its effectiveness? Advocate-General Lenz did not think so:

"If a rule, which at first sight appears to contain a restriction of competition, is necessary in order to make that competition possible in the first place, it must indeed be assumed that such a rule does not infringe article 85(1) [now article 81(1)]. It would be unconvincing to reject that argument on the ground that *paragraph 3* of article 85 [now article 81] in any event provides the possibility of exemption from the prohibition in paragraph 1."⁸⁸⁰

⁸⁷⁷ This argument was also used (although not developed) by the CFI in Case T-65/98, *Van den Bergh Foods Ltd. v. Commission* [2003], paragraph 107. That case also cited Case C-235/92P *Montecatini v. Commission* [1999], paragraph 133; Case T-14/89 *Montedipe v. Commission* [1992], paragraph 265 and Case T-148/89 *Tréfilunion v. Commission* [1995], paragraph 109. It argued that they made the same point. None of them do. They each cast doubt on the applicability of the rule of reason in the specific circumstances of the case, but they do not state, as a general rule, that the rule of reason does not exist in article 81(1) of the Treaty.

⁸⁷⁸ Monti (2002), pages 1060 and 1061. See also, Cseres (2004), page 229; Manzini (2002), page 395 and Commission, *White Paper on Modernisation*, paragraph 57.

⁸⁷⁹ Commission, *White Paper on Modernisation*, paragraph 57. See also, Marengo (1999), page 1240 and Waelbroeck (1987a), page 723.

⁸⁸⁰ Case C-415/93 *Union Royale Belge des Sociétés de Football Association v. Jean-Marc Bosman* [1995], Opinion of Advocate-General Lenz, paragraph 265.

Conducting the economic analysis under article 81(1) does not make article 81(3) of the Treaty redundant.⁸⁸¹ Indeed, this would only be the case if *only* economic considerations were relevant there. However, as we saw in Chapters Two and Four, and as Monti argues in the same paper, other objectives *can be (and are)* considered under article 81(3) of the Treaty. This provides that provision with plenty of 'effect'.⁸⁸²

Is a more subtle point being made? Does the existence of terms such as "...improving the production or distribution of goods or...promoting technical or economic progress..." in article 81(3) mean that some economic efficiency assessment *is demanded* in that paragraph? In other words, do the article 81(3) criteria *necessarily* (at least in part) relate to competition?⁸⁸³ Monti seems to make this point, see Chapter Four. If this were the case, then we might then say that if the economic analysis had already been performed in article 81(1), article 81(3) would become superfluous. However, Chapter Four argued that such a reading was not in line with the Treaty's structure, article 81's wording, the Community Courts' caselaw, or the decision-making practice of the Commission.

One benefit of Monti's argument is that it puts a lot of emphasis on economic efficiency gains. He is right to do this. As Section 2.3. explains, there are many arguments in favour of basing the analysis on economic efficiency today. The Treaty is a living document. Even if economic freedom was a key element of a restriction of competition in the past, it may be time to replace it with an economic efficiency test. Indeed, despite its protests, this may be what the Commission's new economic approach is really aiming to do.

In conclusion, it is difficult to place much credence on the structural argument either. Conducting the efficiency analysis under article 81(1) does not mean that article 81(3) would be cast aside, non-economic considerations could still be considered there. No Treaty change would be needed. The Commission also argued that it would be paradoxical to introduce a 'rule of reason' under article 81(1) because article 81(3) contains all the elements of such a rule. As discussed above, the 'rule of reason' can mean many things. There are many advantages to

⁸⁸¹ Wesseling (2000), pages 102-105 and 112; Wesseling (1999), pages 421-424; Ehlermann (1998); Korah, V., in (1987) Fordham Corporate Law Institute, page 731 and Forrester and Norall (1984), page 41. See also, the opinion of Advocate-General Léger, Case C-309/99 *J.C.J. Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002], paragraphs 104-108. In fact, in response to the Commission's argument, that justifications linked to public policy issues should be considered under article 81(1) of the Treaty, Advocate-General Léger said, paragraph 107 "Such an interpretation is liable to negate a great part of the effectiveness of articles 85(3) [now article 81(3)] and 90(2) [now article 86(2)] of the Treaty."

⁸⁸² It is certainly possible that if only non-economic considerations are relevant under article 81(3) then it will be used less often. This is because in most cases only efficiency issues are raised. In this sense the CFI might be right to say that article 81(3) would lose much of its effectiveness. But this is not really the point. Surely it is only an issue if *only* economic arguments could be used there?

⁸⁸³ This is probably the argument of Waelbroeck in Ehlermann (1998), page 485, although he does not develop it. See also, Waelbroeck (1987a), page 723.

economic efficiency analysis under article 81(1) of the Treaty and interpreting article 81(3) as a non-economic rule of reason, see below.⁸⁸⁴

(c) **The procedural argument**

In 1957, when the Treaty was first adopted, Germany and France were the only Community countries that had a competition law.⁸⁸⁵ The acceptance of the competitive economy was not free from dispute.⁸⁸⁶ By imposing a very wide interpretation on article 81(1) (by adopting an economic freedom test rather than economic efficiency),⁸⁸⁷ the Commission deliberately took control of the application of article 81 and its development.⁸⁸⁸ Under Regulation 17, only the Commission could implement article 81(3), see Chapter Two.

The Commission's approach had some logic.⁸⁸⁹ At least initially, control was considered important. Antitrust rules called for fundamental, indeed revolutionary, changes in centuries old habits of thoughts and patterns of conduct.⁸⁹⁰ The Commission needed to gain experience of how the market functioned. Furthermore, antitrust rules were not well understood by European firms at the time.⁸⁹¹ It was thought that exemption discussions with the Commission would give businesses a lot more certainty.⁸⁹² Placing a sole decision-maker in charge of article 81 should also have ensured a more uniform interpretation and coherent application.⁸⁹³

Such arguments imply that the Treaty should be interpreted in light of secondary Community legislation. This is incorrect. Relative competences within article 81 should not have governed the article's substantive interpretation.⁸⁹⁴ In any event, Regulation 1/2003 has fundamentally

⁸⁸⁴ The Commission also argued that it would be dangerous for it to assume there were an economic rule of reason within article 81(1) of the Treaty without the backing of the Community Courts. As the Community Courts have the final say on Treaty interpretation this is, in a certain sense, correct. However, in reality, what is 'dangerous', in the sense it is used by the Commission, is to interpret the Treaty incorrectly. In a similar vein, it would also be 'dangerous' to rely on the fact that there is *not* an economic rule of reason in article 81(1), if this proved to be wrong. The Commission does not hesitate to do this, even though it acknowledges that the Community Courts have used an economic rule of reason before, see above.

⁸⁸⁵ Graupner (1965), page 9.

⁸⁸⁶ Amato (1997), page 43.

⁸⁸⁷ Hawk (1995) and Forrester and Norall (1984).

⁸⁸⁸ Korah (1990), page 1015; Bright (1995), pages 514-516; Amato (1997), page 118; Siragusa (1997), page 276; Bergès-Sennou (2002), page 438 and Komninos (2005) DRAFT, footnote 5.

⁸⁸⁹ Schaub (2001), page 50.

⁸⁹⁰ Forrester and Norall (1984), pages 12, 13 and 19; Marengo (1999), page 1220 and van Miert (1999), page 1.

⁸⁹¹ Press Release IP/04/411 and Siragusa (1997), page 276.

⁸⁹² See, Forrester and Norall (1984), pages 18-22 and Korah (1986), page 94.

⁸⁹³ van Miert (1997), page 36.

⁸⁹⁴ See, Case 48/72 *S.A. Brasserie de Haecht v. the spouses Wilkin-Janssen* [1973], paragraph 6; Baquero Cruz (2002), pages 56 and 57, and the references made there; and Mestmäcker (2000), pages 414-416 "Article 83

altered Regulation 17. Today, the Commission, as well as Member States' courts and competition authorities have jurisdiction to interpret article 81 in its entirety. The whole provision is now directly applicable.

As a result, the procedural argument no longer has, if it ever had, merit.

(d) **The constitutional argument**

The constitutional argument, in brief, is that economic freedom has the status of a fundamental right in the Community legal order. This right must be protected. Amongst others, this should be done through the competition provisions, particularly articles 81 and 82. If article 81 is to protect the right, then economic freedom must be considered within article 81(1) of the Treaty. If economic freedom could only be considered under article 81(3) of the Treaty, then it would be irrelevant whenever article 81(1) were not breached. If, for example, article 81(1) were held to promote economic efficiency, then this fundamental individual right (economic freedom) would then be permanently undermined by a utilitarian majoritarian value (economic efficiency). This would fundamentally diminish the right's value.

In Community law circles it is generally accepted that the Treaty, as interpreted by the Community Courts,⁸⁹⁵ forms the constitution of the EU.⁸⁹⁶ The ECJ agrees.⁸⁹⁷ Constitutionalism denotes the basic idea of limited government under the rule of law.⁸⁹⁸ The doctrines of direct effect and supremacy allow individuals to rely on Community law (which national law cannot overrule) before national courts even against the Member States and the Community itself.

"Consequently, the Treaty offers individuals enforceable constitutional guarantees even against democratic decisions, whether taken at Community or national level..."⁸⁹⁹

That said, not everyone shares the view that the Treaty is a constitutional document. The German Constitutional court, for example, refutes the idea that the Treaty is anything other than an international agreement between sovereign states.⁹⁰⁰ Nevertheless, we can ignore this issue in

regulations are to give effect to the principles enshrined in the competition rules. They cannot change these principles nor can they modify the Treaty."

⁸⁹⁵ Craig and de Búrca (1998), pages 163-165 and Petersmann (1991), page 256.

⁸⁹⁶ See, for example, Joerges (2002), page 9 and Weiler (1997).

⁸⁹⁷ "...the EEC Treaty...constitutes the constitutional charter of a Community based on the rule of law.", Opinion 1/91 *Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty* [1991], paragraph 21.

⁸⁹⁸ Case 294/83 *Parti Ecologiste 'Les Verts' v. European Parliament* [1986], paragraph 23 and Petersmann (1991), page 252.

⁸⁹⁹ Sauter (1998), page 31.

⁹⁰⁰ The issue is discussed in Joerges (2002), section 2.2.2.; Sauter (1998), pages 36 and 37 and Zuleeg (1997).

the present discussion, because, even on the assumption that the German Constitutional court is wrong, the resulting arguments do not undermine the change we advocate.

So, what sort of constitution is it? Were the actors that developed the aforementioned doctrines (direct effect and supremacy) following a particular vision of the European project to justify its primacy?⁹⁰¹ Some believe so. The Ordoliberals have long understood both the German Federal Republic and Community as political systems based upon an Ordoliberal economic constitution.⁹⁰²

As we saw above, the Ordoliberals considered a coherent legal framework as essential to guarantee individual freedoms and economic progress. Remember that the economic constitution indicates the legal structure that determines the type of economic system a state will pursue. It sets out a related system of principles that bind economic policy. The state then guarantees this economic order by enforcing the economic constitution. Sauter writes that:

"The state is constrained to observe the economic constitution, as it incorporates justiciable criteria. These constraints can take various forms, such as clear objectives for state policy, limits on its competence, limits on the instruments of state action, and, especially, individual rights that are directly enforceable."⁹⁰³

Is the Community legal order based upon an Ordoliberal economic constitution? If so, this would be important for our argument.⁹⁰⁴ Remember that, for Ordoliberals, competition law is a key part of this economic constitution. Competition has a value in its own right, which goes far beyond mere efficiency criteria.

"In this view, the economic constitution serves, first, to guarantee the basic equality of individuals as economic subjects; second, to back up the private law society by public authority; and third, to protect civil liberties...Thus, under the Ordoliberal economic constitution, economic rights and freedoms enjoy equal status to traditional political rights and freedoms, and may be enforced against majoritarian decisions."⁹⁰⁵

Here lies the difficulty. If the Community is based upon an Ordoliberal economic constitution, then competition law (including article 81) should be a key part of that order. In line with Ordoliberal values, the concept of a 'restriction of competition' under article 81(1) of the Treaty must refer to economic freedom. This would be a right of higher rank, protected under this constitutional order.⁹⁰⁶ As a result, if we changed the interpretation of a 'restriction of

⁹⁰¹ Joerges (2002), page 10.

⁹⁰² Sauter (1998), page 47 and Chalmers (1995), page 56.

⁹⁰³ Sauter (1998), page 47.

⁹⁰⁴ Sauter (1998), page 47.

⁹⁰⁵ Sauter (1998), pages 47 and 48. See also Chalmers (1995), page 57.

⁹⁰⁶ "We suggest that fundamental rights are commonly regarded as being at the peak of the normative hierarchy of laws against which other rules are to be measured.", Coppel and O'Neill (1992), page 682.

competition' to mean economic efficiency it might be argued that we are undermining a fundamental right (economic freedom) with a utilitarian rule (economic efficiency).⁹⁰⁷ Such a modification would involve a fundamental change in the constitutional order. This would need to be justified at the constitutional level.

Why might the Community be based upon an Ordoliberal economic constitution? Perhaps, the answer lies in its past? If Germany is founded on the Ordoliberal tradition then economic freedom must be a fundamental right there. As a result, so the argument goes, this fundamental right must have entered the Community legal order, see below.

However, it is questionable whether Germany,⁹⁰⁸ let alone the Community, is founded on the Ordoliberal tradition. Sauter reports that the German Constitutional court has held quite the opposite, denying the constitutional status of economic liberalism in Germany.⁹⁰⁹ In addition, there are many ways in which the Community legal order does not reflect (or no longer reflects) the Ordoliberal position.⁹¹⁰ This is unsurprising. The Community is a new legal order.⁹¹¹ Community law is strongly influenced by the constitutional traditions of the Member States, but it does not rest on any preconceived constitutional blueprint. Joerges writes:

"Academic legal theories do not represent the actual law. Nor are they, however, just arbitrary normative constructs. All academic legal theories of integration are similar in that, in their interpretation of the EEC Treaty, they refer to assumptions that are partly extralegal, partly empirical, and partly theoretical. They reflect what is possible and desirable under specific historical conditions."⁹¹²

⁹⁰⁷ "As the law now stands...the competition rules contained in the Treaty have a constitutional status and may be interpreted as shaping a *law of economic liberty* from restraints of competition and abuses of economic power, not only a *law of economic efficiency*. Thus, an efficiency-orientated approach may not be in tune with the current normative structure.", Baquero Cruz (2002), page 1.

⁹⁰⁸ The same would apply if it were protected in another Member State too. However, I restrict my enquiry to Germany because the Ordoliberal tradition is rarely followed outside Germany, Joerges (2002), page 6 and Sauter (1998), page 49. Attempts by authors such as Gerber to show that "Competition law in Europe is based primarily on ideas developed by European thinkers..." show little more than that the Member States (outside Germany) have often implemented competition laws with similar wording to articles 81 and 82 of the Treaty, see Gerber (1998), pages 401-416. In support of his case, Gerber only examines Sweden, Italy and France. He looks at the wording, but fails to examine the substance (and background), of their competition provisions. This was a mistake. "However similarly competition rules may have been worded by the Community and by national legislators, their application may result in divergent decisions as it has to follow the different objectives underlying apparently similar rules.", Ullrich (1996), page 182. For example, the Italian equivalent of article 81(1) is an economic efficiency test, see Siragusa (1998), pages 470, 565 and 566 and Laudati (1998), pages 396-401. Wesseling (2000), page 105, agrees, and suggests that the French law does the same. Drahos (2001), chapters 4 and 5, describes considerable convergence between the European competition regime and that of Germany and Austria; and has similar, though weaker, conclusions vis-à-vis Dutch competition law.

⁹⁰⁹ Sauter (1998), pages 48 and 49.

⁹¹⁰ See, for example, Baquero Cruz (2002), pages 26-29; Sauter (1998), pages 46-68; Poiars Maduro (1997), pages 65-67 and Chalmers (1995), pages 66-72.

⁹¹¹ See, for example, the *van Gend en Loos Case*, page 12, "...the Community constitutes a new legal order..."

⁹¹² Joerges (1997), page 4. See also, Joerges (2002), pages 5 and 11.

But this does not yet mean that we can ignore the rights-based critique. Even if the Ordoliberal model has not been accepted lock, stock and barrel into the Community legal order, it has had a considerable influence, see above. The critique would still have force if it could be shown that:

- economic freedom is a right of higher rank, protected under the Community constitutional order, even though this is not based on an Ordoliberal economic constitution;⁹¹³ and that,
- the concept of a 'restriction of competition' under article 81(1) of the Treaty, refers to economic freedom.

Fundamental rights form an integral part of the general principles of Community law.⁹¹⁴ Do these rights include economic freedom? Some believe that the enquiry should start by reference to national law. They argue that if economic freedom were a fundamental right in Germany, it would be a fundamental right in the Community legal order too. For example, Advocate-General Warner has said:

"...a fundamental right recognised and protected by the Constitution of any Member State must be recognised and protected also in Community law. The reason lies in the fact that, as has often been held by the Court...Community law owes its very existence to a partial transfer of sovereignty by each of the Member States to the Community. No Member State can...be held to have included in that transfer power for the Community to legislate in infringement of rights protected by its own Constitution. To hold otherwise would involve attributing to a Member State the capacity, when ratifying the Treaty, the power to flout its own Constitution, which seems to me impossible."⁹¹⁵

However, this starting point lacks merit for two reasons. First, while Ordoliberals argue that economic freedom should be entrenched as a constitutional principle; we have not found evidence of economic freedom being a fundamental right in German Constitutional law.⁹¹⁶ However, even if we are wrong on that point, the Community Courts have never gone so far as to accept Advocate-General Warner's thesis here.⁹¹⁷ Indeed, they approach the issue in a fundamentally different way:

"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the

⁹¹³ The economic freedom rule must be of a higher rank, in order to justify its status as a right, as opposed to merely a conflicting policy interest.

⁹¹⁴ Craig and de Búrca (1998), Chapter 7; Coppel and O'Neill (1992), pages 670-672 and Petersmann (1991), page 257.

⁹¹⁵ The Opinion of Advocate-General Warner in Case 7/76 *IRCA v. Amministrazione delle Finanze dello Stato* [1976], page 1237.

⁹¹⁶ See, for example, Michalowski and Woods (1999). Although, German Constitutional law guarantees a general right to liberty, which may be applicable in this respect, see Alexy (2002), Chapter 7. Thanks to Ernst-Ulrich Petersmann for this comment.

⁹¹⁷ Hartley (2004), page 299.

uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principles of a national constitutional structure.

However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."⁹¹⁸

So we should examine the Community legal order directly.⁹¹⁹ Has economic freedom been given a higher constitutional status by the ECJ such that article 81(1) must refer to this concept? The answer is probably not. The explanation of why not comes in two parts.

First, although the ECJ calls 'freedom of competition' a general principle of Community law, it has not defined the concept and it has actually said that references to 'freedom of competition' in articles 4, 98 and 105 of the Treaty cannot be invoked by individuals against the Member States.⁹²⁰ Therefore, and this is the second point, one would have to find this 'higher constitutional principle' embedded within one of the operational treaty provisions, such as article 81(1). However, the caselaw is unclear on whether a restriction of competition is a restriction of economic freedom. Furthermore, even if a restriction of competition had been interpreted in this way, the Community Courts (and the Commission) have not injected this concept with a higher constitutional status. Instead, when it is mentioned, it is treated as a policy objective to be balanced against all others.

Let's consider these points in more detail. First, in Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées* [1985], for example, the ECJ held, paragraph 9:

⁹¹⁸ Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970], paragraphs 3 and 4. A similar point is made in relation to article 81, Case 14/68 *Walt Wilhelm and Others v. Bundeskartellamt* [1969], paragraphs 3-7.

⁹¹⁹ Schröter (1987), page 646.

⁹²⁰ This also undermines the possibility of a 'general right to liberty' in the Community legal order, as there is in, for example, Germany, see above. Nor would I argue in favour of such a general right to liberty. This turns legislating on its head, generally favouring rights over majoritarian goals, instead of in a minority of important cases. Unfortunately, there is not space to discuss this issue in full; many theses could be written on the topic, see, for example, Zucca (2005).

"...the principles of freedom of movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance."

As a result, Coppel and O'Neill,⁹²¹ argue that the ECJ has elevated the free market freedoms guaranteed in the Community to fundamental rights status. Presumably, in their view, the same would apply to freedom of competition.⁹²² They saw this as controversial.⁹²³

These freedoms are certainly important in the Community legal order. That said, when one penetrates the rhetoric, it is hard to believe that they have been given fundamental rights status. First, we saw in Chapter Two's discussion of the *Échirolles Case*, that the ECJ has held that when the Treaty, in articles 4, 98 and 105, states that Community economic policy must comply with the principle of "...an open market economy with free competition...";⁹²⁴ this does not impose clear and unconditional obligations on the Member States which can be relied upon by individuals.⁹²⁵ Rather these are general principles, calling for complex economic assessments. They are objectives to be weighed in the balance, not privileged 'trumps' that can be invoked by individuals.⁹²⁶ It is widely accepted that freedom of competition can be restricted by the pursuit

⁹²¹ Coppel and O'Neill (1992), pages 689-691.

⁹²² Petersmann (2003), page 62.

⁹²³ Coppel and O'Neill saw such an elevation of these freedoms as controversial, for once this happens, other 'conventional' fundamental rights will have the same status as these freedoms and can no longer act as a bulwark against them. As a result, "The invocation of the idea of fundamental rights by the European Court does not set essential limits to lawful executive action, because executive action which has as its object the promotion of the four market freedoms [as well as freedom of competition] is itself, in the vocabulary of the European Court, instantiating a fundamental right.", Coppel and O'Neill (1992), page 690. However, this could be beneficial. Petersmann argues, for example, that "...the everyday experience of most citizens is that their standard of living and their possibilities in life depend largely on their individual opportunities to produce and consume goods and services of their own choice; for that reason, the EC tradition of regulating economic freedoms and policies at the constitutional level should be maintained.", Petersmann (1995), page 1155. In this view these very rights become the bulwark against state and individual power.

⁹²⁴ I assume here that 'free competition' refers to economic freedom. This is far from certain, see above. However, if it does not refer to economic freedom, then the argument that this has fundamental rights status is even harder to make.

⁹²⁵ Sauter (1998), pages 40 and 41, calls 'free competition' a political, as opposed to a legal, principle. See also, Arnall, Dashwood, Ross and Wyatt (2000), page 153.

⁹²⁶ Petersmann (1995), page 1154, refers to an earlier article he wrote (unfortunately this is in German and so I cannot read it) about the "...EC's 'economic constitution' and the still inadequate constitutionalisation of the EC's agricultural, competition, industrial and anti-dumping policies see Petersmann, "Grundprobleme des Wirtschaftsverfassung der EG", (1993) *Aussenwirtschaft*, 389-424."

of other legitimate Community objectives.⁹²⁷ As Chapter Two claimed, the same principles are likely to apply to Community measures too.⁹²⁸

Furthermore, even if it could be argued that competition has been given such a status, the content of this 'right' remains undefined. Unless it can be shown that *freedom of competition equates to economic freedom* then economic freedom's privileged hierarchical status remains in doubt. Some seem to make this argument.⁹²⁹ However, it is far from clear that the Treaty has promoted economic freedom to the level of a Constitutional principle in its own right.⁹³⁰

That does not get us all the way. It may be that freedom of competition cannot be invoked through article 4, etc. This does not necessarily mean that a fundamental right to economic freedom could not be found in the operative provisions of the Treaty, perhaps article 81, for example. This is the second part of our argument.

However, as we have already seen, Section 2.1., a restriction of competition, for the purposes of article 81(1), has not been consistently interpreted as a restriction of economic freedom. As a result, it is hard to argue that that provision promotes this 'fundamental right'. Furthermore, even if a restriction of competition, for the purposes of article 81(1), had been interpreted as economic freedom, the Community Courts (and the Commission) have not provided it with fundamental rights status. Dworkin explains that rights must have:

"...a certain threshold weight against collective goals in general...for example...[they] cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency...[if this is not the case] the putative right adds nothing and there is no point to recognising it as a right at all."⁹³¹

Weiler and Lockhart argue that one should not confuse this lexicographical similarity (the use of the word 'right') in Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées* [1985], paragraph 9. They argue that it is going too far to claim that

⁹²⁷ Sauter (1998), page 63 and Poiars Maduro (1999), page 454, the ECJ has "...to my knowledge never struck down Council legislation for violation of such economic rights and freedoms." This does not necessarily decide the issue. Rights can sometimes be undermined. However, 'competition' has not been given a fundamental rights status through article 81, see below.

⁹²⁸ This is implicitly accepted by Petersmann (1991). At page 258, he calls the market freedoms and competition policy "...the primary objective of the EEC Treaty..." He does not expressly say they have constitutional status in the Treaty, although Sauter (1998), page 45, interprets him in this way. That said, Petersmann argues that the Community Courts should treat the market freedoms and competition policy as fundamental rights of EC Citizens against the Community institutions, pages 266-270. The implication being that they do not as yet do that.

⁹²⁹ See the references in Sauter (1998), footnote 59. Unfortunately all references are to articles in the German language. As I do not read German, my ability to reply to these arguments specifically is restricted.

⁹³⁰ Demetriou and Higgins (2003) make a similar point in relation to the free movement provisions.

⁹³¹ Dworkin (1977), page 92.

the ECJ has elevated these freedoms to the status of fundamental rights, which is not to say that they are not extremely important Community principles. They write:

"In general the jurisprudence on market freedoms is rather flexible in yielding to non-protectionist competing values far less grave than human rights."⁹³²

This can be seen in Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées* [1985] itself. There the ECJ continued, paragraph 12:

"...it should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantially impaired."

This argument is not watertight, because even fundamental rights give way to utilitarian necessities on occasion.⁹³³ However, the flexibility that Weiler and Lockhart point to undermines the claim to a 'fundamental rights' status for these concepts. The same can be seen with respect to 'restrictions of competition' under article 81(1) of the Treaty. A number of peculiarities in the way this provision is applied belie the notion that it protects a fundamental human right in the Community legal order:

- Chapter Three argued that they have been balanced against other values within article 81(1) of the Treaty;
- restrictions of competition are often allowed because they are not appreciable; and,
- we have seen that the Community Courts have told the Commission to balance restrictions of competition against the article 81(3) values, Chapter Two.⁹³⁴ Chapter Four showed that there were no Commission decisions where non-economic objectives had been raised, under article 81(3), and where the Commission accepted that these arguments were in fact relevant, where these non-economic objectives did not win, i.e. tilt the balance in their favour (and against a restriction of competition).⁹³⁵ One might say that competition can never be eliminated, article 81(3)(b), but this protection falls far short of that given to fundamental rights.

Finally, when discussing article 81(1) we normally resort to shorthand and only mention 'restrictions of competition'. However, the provision also refers to 'distortions of competition'.

⁹³² Weiler and Lockhart (1995), page 596. More generally see their pages 593-596; Chalmers (1995), pages 70 and 71 and Frazer (1990), pages 612-615.

⁹³³ Dworkin (1977), page 92. See, for example, the European Convention, Part I, Title II.

⁹³⁴ Even advocates of the individual freedom standard agree that this must be balanced against consumer welfare considerations, for example, Schröter (1987), page 659.

⁹³⁵ Some may reject this reading of the balance. However, even Monti's reading of article 81(3)'s first test, see Chapter Four, undermines the idea that economic freedom has 'fundamental rights status' in article 81(1) of the Treaty.

Normally these two concepts are dealt with in the same way. However, on occasion, the Commission has said that distortions do not only occur when existing competition is *diminished* by an agreement. Article 81(1) of the Treaty can also be breached when competition is *increased or intensified*.⁹³⁶ The Ordoliberals believe that market power should be diffused as far as possible. If 'competition' for the purposes of article 81(1) were considered a fundamental right, there would be no place for a concept such as distortion and increasing competition would not be seen as wrong.

If 'restriction of competition' meant restriction of economic freedom and this had been given fundamental right status within the Community legal order, one would not expect to find derogation so easy to achieve. What would we say if the Community Courts allowed *de minimis* torture? Is it wrong to increase freedom of speech? Would we allow even appreciable torture on the understanding that this would enhance industrial policy? Probably not.

Would the position change under the European Convention, if adopted? There is an increased emphasis on freedom, this being mentioned as one of the founding values of the European Union, article I-2.⁹³⁷ However, the provision goes on to explain that these values are common to the Member States. Outside of Germany the economic freedom notion receives little support, so it is unlikely that the Constitution refers specifically to economic freedom here. There may also be support in article I-3, which states that the Union will offer its citizens an internal market where competition is free and undistorted. Does this reinforce the notion of economic freedom? Once again, it is far from certain. The language is similar to 'free competition' and we have seen that the ECJ said article 4 of the Treaty could not be relied upon to give individual rights.⁹³⁸ Furthermore, article I-3 also refers to undistorted competition. This may oppose the economic freedom idea, which would demand that market power should be diffused even if the market tends towards oligopoly.⁹³⁹ On top of this, freedom of competition is not mentioned in article I-4, a provision entitled 'fundamental freedoms and non-discrimination'.

In conclusion, economic freedom has, at times, been promoted as a relevant value under article 81 of the Treaty. Having said that, it is far from clear that it has the status of a fundamental right in the Community legal order. Even if it has, there is currently little evidence to show that it must be protected as such within article 81(1). Furthermore, we are not persuaded that this position will change even if the European Convention is adopted. It is not directly protected in

⁹³⁶ Barack (1981), page 136 and Smit and Herzog (1976), Volume 2, section 85.26, paragraph 3-122. The ECJ in Case 262/81 *Coditel SA, Compagnie Générale pour la Diffusion de la Télévision, and Others v. Ciné-Vog Films SA and Others* [1982], paragraph 20, may also distinguish between restriction and distortion.

⁹³⁷ See also the references to 'liberty' in article II-66 and economic rights in articles II-75 and 76.

⁹³⁸ The same would likely apply to an argument in favour of a 'general right of freedom', see above.

⁹³⁹ Hildebrand (2002), page 158.

Section I, Title II of the European Convention, nor is its protection inspired by the constitutional traditions common to the Member States.

(e) Conclusion of Section 2.2.1.

The arguments for including economic freedom within article 81(1) are not convincing. The historical approach to Treaty construction is fraught with danger and is rarely employed by the Community Courts. True, there were practical reasons why, in the past, interpreting a restriction of competition as a restriction of economic freedom may have been beneficial. These principally arose as a result of Regulation 17. It is questionable whether the presence of secondary legislation should have been allowed to distort the interpretation of the Treaty. In any event, Regulation 17 no longer exists and the whole of article 81 is directly applicable. On top of this, there is little evidence that economic freedom has, in fact, achieved constitutional status in the Community legal order, let alone that this is manifest in the current article 81 caselaw.⁹⁴⁰

That is not to say that the economic freedom concept is worthless. It is not.⁹⁴¹ But it does mean that its claim to article 81(1) holds much less weight. If it does not have true constitutional status then changes to article 81(1)'s interpretation (if indeed this is a change) need less justification. It is merely a value to be balanced against others. Section 2.2.2. goes on to provide some positive reasons against employing economic freedom in article 81(1) of the Treaty.

2.2.2 Against economic freedom

Article 81(1) has been given a broad interpretation.⁹⁴² Many of these commentators point to a formalistic approach focusing on restrictions of economic freedom.

This has often been criticised. For example, Hawk complains that this concept: (a) fails to generate precise, operable, legal rules; (b) can undermine economic efficiency analysis, which he claims provides a suitable analytical framework; (c) favours traders/ competitors over consumers and consumer welfare; and, (d) captures totally innocuous contract provisions under article 81(1) of the Treaty which have no anti-competitive effects in an economic sense.⁹⁴³

⁹⁴⁰ There are certain textual, contextual and functional arguments in favour of economic freedom. We should be extremely careful about relying on such arguments however. The Vienna Convention's guide to Treaty interpretation is inappropriate in the Community legal order, which has its own rules of interpretation, see Chapter Two. Nevertheless, Section 2.3. discusses the textual and functional arguments. The contextual ones have been dealt with in Section 2.2.1. Briefly put, the ECJ held that 'free competition' did not create individual rights that could be relied on. As a result, it is improbable that the Community legal order incorporates a general right to liberty which can be relied on either.

⁹⁴¹ Sen (2002), particularly chapters 9, 17 and 20-22, emphasises a similar concept; Amato (1997), pages 1-4; Schröter (1987), pages 667-670 and Petersmann (1991).

⁹⁴² See, for example, Venit (2003), pages 548 and 549; Fox (2001), page 23; Bishop (2001), pages 56 and 58; Forrester (2001), page 76; Venit (2001), page 291; Ehlermann (1998), page xiv and Hawk (1995), section 2.

⁹⁴³ Hawk (1995), page 978.

These problems are exacerbated because, as the internal market is increasingly realised, more and more agreements affect trade between Member States, and thus fall within article 81's jurisdictional threshold.

Assume that a restriction of competition under article 81(1) can be equated with a restriction of economic freedom, which is far from clear, see Section 2.1. Before one can criticise this practice, one must understand why economic freedom is being pursued. There are, essentially, two schools of thought:⁹⁴⁴

- some believe that economic freedom is used to assess whether there is a reduction in allocative efficiency. Such people may not agree with Hawk's four-point critique, in fact, but at least they would accept that his points are relevant;
- others argue that facilitating market access is essential in its own right, even if this undermines economic efficiency. Think of the Ordoliberal School, for example. For these people much of Hawk's critique is simply misplaced.

By distinguishing between these two camps, we hope to inject a little more clarity into the critique of the 'economic freedom' standard.

Marenco falls into the first camp. He argues that one must assess restrictions of economic freedom under article 81(1) of the Treaty. For Marenco, economic freedom is not a value in itself.⁹⁴⁵ Economic freedom is merely a legal concept that enables us to assess whether an agreement tends to reduce allocative efficiency.⁹⁴⁶ Having said that, he accepts that the legal concept (economic freedom) and the economic concept (economic efficiency) are not one and the same.⁹⁴⁷ Some restrictions of economic freedom are actually efficiency enhancing.⁹⁴⁸ In

⁹⁴⁴ Marsden (2000) makes a slightly different argument which, although it is far from clear, seems to relate to market integration. As such, it is discussed in Section 3.

⁹⁴⁵ Marenco (1999), page 1243.

⁹⁴⁶ "La finalité des règles de concurrence est de promouvoir une meilleure allocation des ressources et, par là, la baisse des prix pour les consommateurs.", Marenco (1999), page 1229. At page 1230 he continues "Lorsque des entreprises coopèrent entre elles, il faut se demander si leur accord tend à améliorer quantitativement ou qualitativement l'offre des produits ou services ou si, par contre, il tend à restreindre cette offre...C'est donc la *tendance* de l'accord à augmenter ou restreindre l'offre sur le marché qui doit être jugée...Le critère de la restriction de la liberté entrepreneuriale des parties se prête parfaitement à déterminer cette tendance." See also, page 1243 and Commission, *RCP 1971*, page 11, the last paragraph can be read as encouraging economic freedom for efficiency ends.

⁹⁴⁷ Marenco (1999), pages 1239 and 1240.

⁹⁴⁸ Marenco (1999), page 1238.

order to determine whether this is the case, he turns to article 81(3), where an economic efficiency analysis can be performed.⁹⁴⁹

For Marengo, economic freedom is a legal rule through which we can assess economic efficiency benefits. It is not a perfect rule, but it is more than adequate. Hawk disagrees. First, he criticises economic freedom because it does not provide precise, operable rules.⁹⁵⁰ This is important. Why? Because those in the first camp principally advocate economic freedom as a good, easily applicable, approximation of the economic efficiency standard.

All contracts restrict economic freedom. If all contracts restricted competition, the rule would be clear, but it would be inoperable, and the social costs of consistently implementing it would be unimaginably high.⁹⁵¹ As a result, it is normally agreed that there must be some limit to the notion.⁹⁵² Monti argued that only 'undue' restrictions of economic freedom were relevant, for example, see Section 2.1.1.

But how can we clearly decide what is undue? The answer is far from obvious.⁹⁵³ It is difficult to construct logically consistent limits to the notion:

"...the term 'freedom' provides little guidance, as the once heated debates in Germany and the US some decades ago showed."⁹⁵⁴

The Commission has made many attempts to define the limits of economic freedom, for the purposes of article 81(1). Most have come to naught or been abandoned due to lack of agreement.⁹⁵⁵ The Commission's latest attempt is more helpful but does not go far enough.⁹⁵⁶

⁹⁴⁹ Marengo (1999), page 1238. Although he accepts that sometimes the Community Courts do some of this analysis under article 81(1), Marengo (1999), page 1240.

⁹⁵⁰ See also, Riley (1998), page 483; Korah (1998), footnote 1 and Schaub (1998), page 474.

⁹⁵¹ Areeda and Hovenkamp (2000), page 101 and Bork (1993), page 59.

⁹⁵² See above; Hawk (1995), page 978 and Bork (1993), page 59.

⁹⁵³ Marengo argues that one must distinguish between restrictions which necessarily result from every contract and those which are imposed on future contracts. For example: "...si une entreprise achète tous ses besoins en aluminium pour dix ans à venir par un contrat qui précise la quantité et le prix, soit de façon précise, soit par référence aux cours qui seront cotés par le *London Metal Exchange* au moment de la livraison annuelle, on est en présence d'un exercice de la liberté des entreprises. Si en revanche l'acheteur s'engage à acheter ses besoins chaque année pour dix ans auprès du même vendeur, les termes du contrat devant être négociés les 1^{er} octobre, il s'agira d'une restriction de la liberté entrepreneuriale de l'acheteur en violation de l'interdiction des ententes.", Marengo (1999), pages 1237 and 1238. However, this distinction is unconvincing if economic freedom is there to assess economic efficiency, as neither of these methods is, in and of itself, less efficient than the other. Nor does it reflect the article 81(1) caselaw, think of the *Nungesser Case*, for example.

⁹⁵⁴ Schaub (1998), page 124. Hildebrand (2002), pages 159 and 160, agrees that the issue of economic freedom's limits has caused heated debate in Germany. See also, Hawk (1995), page 979, on the failure to establish clear rules here.

⁹⁵⁵ Luc Gyselen, then of DG Competition, while participating in the Competition Law Workshop, European University Institute, 6/7 June 2003. See also Schaub (1998), page 474.

More generally, Section 2.2.2. showed how unclear the efforts have been to clarify this aspect over forty years of Community decision-making practice.⁹⁵⁷ Nor is it a concept with which businesses are familiar.⁹⁵⁸ Hawk suggests that it is impossible to limit economic freedom in a logically consistent way. Such is the difficulty that, at times, almost every restriction in agreements between significant players seems to require an exemption, see above. In practice, the decision-maker has a lot of discretion.⁹⁵⁹ Therefore, one might question whether the economic freedom concept is a useful proxy for economic efficiency, in that it does not seem easy to apply. Indeed, Hawk goes further. He believes that economic efficiency, unlike economic freedom, provides a framework of precise operable rules which companies and decision-makers can apply, this is discussed in Section 2.3. below.

Furthermore, Hawk points to a tension between economic freedom and economic efficiency, points (b) to (d) above. Hawk would disagree with Marengo, in that he does not think that the economic freedom concept essentially reflects economic efficiency. This goes to the heart of the issue too. If the economic freedom concept produces fundamentally different results from those which would be achieved through application of an economic efficiency standard, then it is not a good proxy.

Hawk's argument comes in two parts. First, he argues that economic freedom is a much wider concept. According to Hawk, it captures many totally innocuous agreements, from an economic efficiency perspective. This point depends somewhat on how one delimits economic freedom and what efficiency standard is used.⁹⁶⁰ But there is overwhelming support for Hawk's view from both jurists and economists, when a consumer welfare standard is adopted.⁹⁶¹ Secondly,

⁹⁵⁶ Commission, *Article 81(3) Guidelines*, paragraphs 13-31. First, these guidelines do not provide an underlying objective to guide article 81(1) analysis in case of ambiguity. Lugard and Hancher (2004), page 411, write that "...the concept of a 'restriction of competition' remains in some cases difficult to grasp as a result of a lack of a clear, quantifiable standard by which agreements are judged." Secondly, although the account of how to apply the provision is quite detailed, it does not capture the entire article 81(1) analysis, see Kjølbye (2004), page 568.

⁹⁵⁷ Admittedly, some of the confusion in the Community is due to the collision of different objectives within article 81(1), see Chapter Three and because the underlying objectives of the provision are unclear, see Section 2.1.1. above.

⁹⁵⁸ Whish and Sufrin (1987), page 4, note this argument.

⁹⁵⁹ Waelbroeck (1987a), page 693, points to controversy as a result of this discretion.

⁹⁶⁰ Möschel (1991), page 14, for example, argues that "...there is no difference between an antitrust law orientated toward protection of competition [by which he means economic freedom] or one orientated toward promotion of economic efficiency [by which he means static and dynamic consumer welfare]." See also page 20 and Cooter (1987). To the extent that Möschel is right, an economic efficiency standard could still be preferable if it offers more predictable rules, see Section 2.3. below.

⁹⁶¹ See, for example, Bishop and Walker (2002), paragraph 5.02; Bishop (2001), page 58; Neven, Papandropoulos and Seabright (1998), page 37; Siragusa (1998), page 544; Heimler and Fattori (1998), page 595 and Hawk (1995), page 981. Venit (1998), page 575, points out that, due to the uncertainty caused by the economic freedom concept, it is often interpreted even more widely than it should be, as undertakings err on the side of caution.

Hawk says that the economic freedom notion tends to favour traders/ competitors over consumers and consumer welfare, and thus often undermines economic efficiency.⁹⁶² There is a lot of evidence for this too.⁹⁶³

Marenco accepts that economic freedom does not capture all efficiencies. However, he sees it as an important legal rule that captures most of them. Divergences can later be corrected in article 81(3). Marenco argues that one cannot apply the economic concept, as it is too unclear. Instead, we must translate it into a legal rule, such as economic freedom. Marenco believes that use of economic freedom enhances legal security.⁹⁶⁴ But it is hard to accept his logic. First, the economic freedom notion is unclear, see above. This means that its application is difficult and controversial. Secondly, Marenco accepts economic efficiency analysis under article 81(3) of the Treaty in any event.⁹⁶⁵

The use of the economic freedom 'shorthand' is hard to apply clearly and consistently. Clear rules can be made, but these seem disproportionate to the efficiency aim,⁹⁶⁶ even undermining it at times. It captures many benign agreements within article 81(1) only to exempt them under article 81(3) of the Treaty. Why not have the efficiency analysis in article 81(1) directly?⁹⁶⁷ This should result in a more accurate efficiency assessment. But there is another important result of defining a restriction of competition within article 81(1) of the Treaty as economic freedom. As discussed in the introduction to this chapter, use of a wide concept there substantially increases undertakings' costs. This was evident under Regulation 17, as only the Commission could apply article 81(3) of the Treaty. However, even under the new regime a wide, uncertain, article 81(1) can significantly increase costs, undermining economic progress for everyone in the Community.

We said above that there were two camps. Marenco fell into the first of these, believing that economic freedom was an indirect measure of economic efficiency. The second camp sees economic freedom as a value in itself. We saw that the Ordoliberal School, for example, believe

⁹⁶² Hawk (1995), page 978.

⁹⁶³ See, for example, Motta (2004), section 1.3.1.3. and Kühn (1997), pages 137-143. Hawk is probably reading the economic freedom context too narrowly. He says that it favours traders/ competitors over consumers and consumer welfare. In fact, economic freedom also favours consumers and their access to market as well. For example, the idea that consumers have a 'right' to purchase goods anywhere in the Community would probably be supported by those in favour of economic freedom. However, Hawk is correct when he says that this is not a majoritarian rule. He is also correct that this rights-based approach can undermine consumer welfare, as Motta (2004) and Kühn (1997) explain.

⁹⁶⁴ "...ce critère [economic efficiency] est également dangereux pour la sécurité juridique, car les entreprises n'auraient pas de point de référence.", Marenco (1999), page 1239.

⁹⁶⁵ Marenco (1999), page 1240.

⁹⁶⁶ See, for example, Bright (1995), pages 509-513 and 518.

⁹⁶⁷ This is not to argue that there should be no *per se* rules, see Section 2.3. below.

that facilitating market access is essential, even if this tends to undermine economic efficiency.⁹⁶⁸

Most of Hawk's critique focuses on explaining how economic freedom is incompatible with economic efficiency, favouring competitors over consumers, see points (b) to (d) above. To those that see the protection of economic freedom as a fundamental right, this is of little relevance. However, we have argued that, in the Community legal order, economic freedom is not treated as a fundamental right, see Section 2.2.1.(d) above.

Where economic freedom is merely an objective like any other the position changes. Section 2.2.1. claimed that the main arguments in favour of using economic freedom within article 81(1) of the Treaty were unpersuasive. Nevertheless, we saw that there are strong arguments in favour of economic freedom. If it is a value promoted in the Community legal order, then this fact alone may justify its presence within article 81(1).

The point of departure is to ask what weight economic freedom is given in the Community legal order. In our view, economic freedom is not a particularly important Treaty value today. It is not mentioned in articles 2, 3 and 4 of the Treaty, or anywhere else. True, article 6 of the Treaty on European Union speaks of 'liberty', as does the European Convention. Furthermore, articles 4, 98 and 105 all promote "...an open market economy with free competition..." But it is far from clear that these concepts refer to 'economic freedom'.⁹⁶⁹ The Community Courts have never equated them, for example. Furthermore, as we saw above, they have said that these references cannot be relied upon by any individual against the Member States. The recent Commission, *Article 81(3) Guidelines* do not mention economic freedom when they discuss article 81(1) of the Treaty. Quite the contrary, they emphasise that:

"The objective of article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."⁹⁷⁰

The lack of emphasis on economic freedom is not particularly surprising. As noted above, the Ordoliberal School, which strongly supports this notion, has had little influence outside of Germany. Nevertheless, the Community Courts and the Commission have both referred to economic freedom in the past, see above. As a result, it would be foolhardy to assume that the

⁹⁶⁸ Wolf is in the second camp, although he believes that the pursuit of economic freedom, while justified in its own right, largely reflects economic efficiency concerns. When it does not, he argues that article 81(3) can be used, Wolf (1998), page 131. Schaub (1998), page 124, also discusses this.

⁹⁶⁹ For example, Petersmann (2003), page 62, suggests that 'free competition' refers to economic freedom, while Niels and ten Kate (2004), page 11, assume it refers to economic efficiency.

⁹⁷⁰ Commission, *Article 81(3) Guidelines*, paragraph 13. In my view one cannot place too much weight on this statement however, because it does not accurately reflect article 81's objectives given its position within the Treaty, see Chapter Two. Having said that, it implies that the Commission no longer interprets 'restrictions of competition' as 'restrictions of economic freedom' either.

concept had no value in the Community legal order, even though the Commission increasingly emphasises an economic approach, see Chapter Two, and many believe that this would bring it more in line with the Community Courts, see Section 2.1.

Having said that, even if economic freedom were given a lot of weight under the Treaty, then the fact that it can significantly undermine consumer welfare (a majoritarian goal) is still relevant, given that economic freedom does not have fundamental rights status. Not everyone is an entrepreneur, seeking to enter the market.⁹⁷¹ By way of contrast, a consumer welfare test benefits us all.⁹⁷² In the absence of clear guidance in the Treaty to the contrary,⁹⁷³ it seems more in line with the article 2 task of "...raising the standard of living and quality of life..."⁹⁷⁴ to define 'competition' as something that benefits the many, rather than the few.⁹⁷⁵

One might argue that using economic freedom within article 81(1) of the Treaty does not really undermine economic efficiency. Those in favour of economic freedom in its own right are not saying that efficiency considerations are irrelevant. They merely consign them to article 81(3). But this approach can still cause significant problems. Remember that economic freedom fails to generate precise, operable, rules. Basing the article 81(1) analysis on a wide, uncertain, concept (such as economic freedom), means that many agreements fall within the Community competition provisions. Even post Regulation 17 a wide, uncertain, article 81(1) creates significant costs for undertakings, and ultimately consumers, see above.

But the arguments against formally adopting an economic freedom standard in article 81(1) of the Treaty do not stop there. Three other issues should be mentioned. First, as we saw in

⁹⁷¹ Which is not to argue that we only benefit from values which we actually use, see Sen (2002), pages 624-626.

⁹⁷² Areeda and Hovenkamp (2000), pages 101 and 102.

⁹⁷³ Does the requirement that agreements seeking exemption must allow consumers a fair share of the resulting benefit show that majoritarian issues need not be considered until article 81(3) of the Treaty? If so, this implies that article 81(1) may not be a utilitarian test. However, imagine that article 81(1) involved a consumer welfare test, and that this could be balanced against, for example, cultural and environmental considerations in article 81(3)'s first condition. It would also be logical to ensure that this balance did not ignore the consumers of the underlying product. In this way, 'fair share' might not solely be measured vis-à-vis the parties to the agreement, but also against society in general. As a result, the reference to 'consumers' in article 81(3) does not necessarily imply that majoritarian issues should be reserved to that provision.

⁹⁷⁴ The Preamble also says that the essential objective of the Member States' efforts through the Treaty is "...the constant improvement of the living and working conditions of their peoples..." See also, article 153 of the Treaty, consumer protection.

⁹⁷⁵ Petersmann (2003), pages 52 and 53 and Areeda and Hovenkamp (2000), pages 101 and 102, also argue that it is fairer. However, their solutions are quite different. Petersmann suggests placing personal liberties beyond majoritarian interests through a rights-based approach. Areeda and Hovenkamp suggest the adoption of the majoritarian interests, a consumer welfare standard. Petersmann rejects this approach, because of the problem of 'capture' and its implications for political markets, Petersmann (2003), pages 52 and 53. The link between political and economic markets is questionable however, Areeda and Hovenkamp (2000), pages 103 and 104. Capture can perhaps be dealt with more efficiently through other means, see, for example, Motta (2004), pages 20 and 21. In any event, a consumer welfare standard already tilts the scales in favour of small interest groups, reducing the chance of capture, see Lyons (2002) and Neven and Röller (2000).

Chapter One, most competition rules are now based on an economic efficiency test. Basing Community competition law on the economic freedom standard runs counter to all of these:

- these different standards make co-operation between those enforcing article 81 and extra-Community competition authorities more difficult.⁹⁷⁶ This is particularly important in this new era of antitrust law, where it is called upon to keep open world, and not just national, markets.⁹⁷⁷ Why is co-operation with extra-Community competition authorities more difficult?
 - It is more difficult for these authorities to understand what the Community standard is. Therefore, it is harder for them to provide assistance in a multi-jurisdictional investigation; and,
 - it is hard to avoid the suspicion that the Community standard somehow discriminates in favour of Community undertakings,⁹⁷⁸ regardless of whether this is true. This may make these extra-Community agencies less co-operative than they would otherwise be.
- The different standards mean that undertakings whose agreements fall within article 81 and an extra-Community competition regime must comply with both sets of rules.⁹⁷⁹ This burden principally falls on Community undertakings, generating economic costs for them and the Community, particularly in relation to technology transfer, industrial co-operation, effective distribution systems and economic progress.⁹⁸⁰

Secondly, an economic freedom standard can undermine other Treaty objectives. In Chapter One we saw how it could undermine market integration, for example. Furthermore, insofar as it undermines economic efficiency it could undermine all the other objectives that the efficiency standard tends to promote indirectly, see Chapter One.

Finally, the fact that economic freedom is hard to define complicates the application of article 81(3) as well. Competition must not be eliminated, article 81(3)(b), surely 'competition' used here must refer to economic freedom if it has that meaning under article 81(1) of the Treaty? Furthermore, it is hard to weigh the objectives which fall within article 81(3)'s first test, against

⁹⁷⁶ Mario Monti (2001); Marsden (2000); Schaub (1998), pages 127 and 128 and Laudati (1998), page 384.

⁹⁷⁷ Amato (1997), page 126.

⁹⁷⁸ This is the implication of Ostry (1993), page 267.

⁹⁷⁹ Mario Monti (2001).

⁹⁸⁰ See, Chapter One; Kaczorowska (2000); Laudati (1998), pages 384 and 385; Bright (1995), page 520 and Addy (1993), page 301. This is also the implication of Venit (2003), page 569.

the restriction of economic freedom under article 81(1), when the latter notion is unclear.⁹⁸¹ The decision-maker must balance an amorphous concept (economic freedom) against other Treaty objectives. When an undefined entity must be weighed in the balance the outcome can be very hard to predict.⁹⁸² This may, in part, explain the lack of clarity so far in the Commission decisions. The introduction to this chapter discussed the costs of this lack of transparency.

In conclusion, if economic freedom is used as a proxy for economic efficiency then it should be replaced. It often undermines the very goal it seeks to promote and does not provide clear, operable rules, which are easy to implement. If economic freedom is promoted as a value in itself, its relevance for article 81(1) is harder to judge and depends on the importance that the concept is given in the Treaty. Despite the difficulties with the definition of a relevant restriction on economic freedom, if defining 'restriction on competition' in this way helps achieve an important Treaty objective then the uncertainty (and costs) that this causes may still be worthwhile. However, economic freedom is not given much weight in the Community legal order today. Furthermore, it undermines majoritarian goals, such as consumer welfare, which better reflect the Treaty aims; it threatens co-operation with extra-Community competition authorities; it undermines other Treaty objectives; and, it imposes significant costs on Community undertakings and consumers alike. As a result, if economic freedom is to be considered at all, and we may decide that it is simply too uncertain a criterion to apply, however beneficial its aim, it may be better to relegate it to article 81(3) of the Treaty.

2.2.3 Conclusion of Section 2.2.

Section 2.1. argued that the definition of a restriction of competition for the purposes of article 81(1) of the Treaty had not been interpreted clearly or consistently. Nor is the position any clearer today. This is unacceptable and so Section 2.2. asked whether economic freedom should form the bedrock of analysis under article 81(1) of the Treaty.

Why was economic freedom considered? First, a long and noble tradition, originating in Austria and Germany has emphasised the importance of competition as a process, as opposed to *just* as an outcome. This tradition has had an important influence on Community competition law in general and article 81 in particular. As a result, economic freedom has been referred to within that provision in the past.

Section 2.2.1. examined the four main arguments used to justify economic freedom's consideration within article 81(1) of the Treaty. It argued that none of them were convincing.

⁹⁸¹ Commission, *Article 81(3) Guidelines*, paragraph 12 say "The assessment of any countervailing benefits under article 81(3) necessarily requires prior determination of the restrictive nature and impact of the agreement."

⁹⁸² It would be exceedingly difficult, if not impossible, to construct rational criteria to govern conflicts between economic freedom and efficiency, Areeda and Hovenkamp (2000), pages 108 and 109.

This does not mean that economic freedom should be rejected, but it does undermine our use of this value.

Section 2.2.2. went on to discuss arguments against considering economic freedom within article 81(1) of the Treaty. It distinguished between two uses of the economic freedom concept. Sometimes economic freedom is used as a proxy for economic efficiency. In this case we concluded that it should be replaced. However, most people that argue in favour of using economic freedom promote it as a value in itself. In this case, its relevance for article 81(1) is harder to judge and depends on the importance that the concept is given in the Treaty. In our view, economic freedom is not given much weight in the Community legal order anymore. Furthermore, its presence in article 81(1) produces many costs. As a result, we concluded that if economic freedom is to be considered at all, it may be better to relegate economic freedom to article 81(3) of the Treaty. However, this should only be done if a concept can be found which is more in line with the Treaty's objectives.

2.3 Another Suggestion

Section 2.2. argued that economic freedom is no longer a strong candidate for consideration within article 81(1) of the Treaty. Considering the values that the Treaty (as interpreted by the Community Courts) promotes today, is there another concept that would serve as a better basis for article 81(1)?

In Section 2.2.1. we saw Odudu argue that a 'restriction of competition' under article 81(1) of the Treaty might refer to allocative efficiency. This seems coherent with article 81's wording.⁹⁸³ However, in our view, Odudu does not make a sufficiently persuasive case. A provision's actual wording is not the key issue when it comes to Treaty interpretation. Nor do we think that the Community Courts' caselaw supports him as much as he claims.⁹⁸⁴

⁹⁸³ Neven (1998), page 112.

⁹⁸⁴ Although, in general, allocative efficiencies are emphasised in article 81(1) analysis, Neven (1998), page 117, Section 2.1.2. and Chapter Three argue that cases such as *Nungesser* seem to consider productive and dynamic efficiencies within article 81(1) of the Treaty. See also, Commission, *Article 81(3) Guidelines*, paragraph 18(2) and Kjølbye (2004), pages 567-569. Furthermore, in some Commission decisions, such as Commission decision, *CECED*, the Commission emphasises allocative efficiency gains in its article 81(3) analysis.

Furthermore, splitting out the allocative efficiency analysis does not make much sense from an economic perspective.⁹⁸⁵ Verifying whether an agreement reduces efficiency is not very meaningful without examining possible pro-competitive effects as well (be they allocative or dynamic).⁹⁸⁶ It also leads to confusion between economists and lawyers as to what considerations are relevant at each stage of analysis.⁹⁸⁷ The Commission accepts this:

"...the current division between paragraph 1 and paragraph 3 in implementing article 85 [now article 81] is artificial and runs counter to the integral nature of article 85, which requires economic analysis of the overall impact of restrictive practices..."⁹⁸⁸

Examining all efficiency issues together would bring the concept of a 'restriction of competition' under article 81(1) closer to the mainstream economic notion of consumer welfare. It would also mean that the same burden of proof would apply to all economic issues.⁹⁸⁹ This would improve the focus and clarity of economic analysis under article 81. As article 81(3) has been deemed appropriate for the consideration of other issues, see Chapters Two and Four, it might be better to combine all the economic efficiency analysis within one paragraph. Section 2.3. asks whether it makes sense to focus on an integrated welfare analysis in article 81(1) of the Treaty.

"Economists claim that if the antitrust laws were more firmly grounded in microeconomic theory, these laws would be politically more stable, their enforcement would be simpler, more consistent, and predictable, and their social benefits larger."⁹⁹⁰

These are important benefits and we discuss them below. However, before doing this we must deal with a couple of preliminary issues. First, is an economic welfare test compatible with the Community legal order? Secondly, there are many types of economic efficiency test, see Chapter One. What type of test are we referring to here?

Schröter warns us not to adopt general terms from other legal systems unless they 'fit' in our legal order too.⁹⁹¹ He was worried that the adoption of an American rule of reason within article

⁹⁸⁵ For example, it raises some complex conceptual problems. Although it is hard to imagine, an agreement might promote allocative efficiency and yet, in the long term, be efficiency-reducing where it eliminates/ reduces the chance of productive or dynamic efficiencies. Under Odudu's system, these issues could not be dealt with as the agreement would not fall within article 81(1) of the Treaty. As productive and dynamic efficiencies are often the most important, from an efficiency perspective, see Chapter One, then this could ultimately be bad for consumers. In addition, productive and dynamic efficiencies reduce allocative efficiency losses in the long term. Is Odudu suggesting that we should really distinguish between long and short term gains? This would be extremely complex, and would ultimately lead to some quite artificial distinctions.

⁹⁸⁶ Verouden (2003), pages 528, 572, 574 and 575; Venit (2003), page 575; Gyselen (2002a), page 197; Bishop and Walker (2002), paragraph 5.05 and Hawk (1995), page 987.

⁹⁸⁷ The economic analysis has nearly always been split between article 81(1) and 81(3) in the past. As such it is unsurprising that the precise dividing line between these provisions has been a recurring question, both in the literature and the Community Courts' caselaw, Verouden (2003), pages 528 and 575.

⁹⁸⁸ Commission, *White Paper on Modernisation*, paragraph 49.

⁹⁸⁹ Regulation 1/2003, article 2, discussed above.

⁹⁹⁰ Jenny (1993), page 197.

81(1) of the Treaty would be inappropriate.⁹⁹² This is an important point. Given that (like economic freedom) economic efficiency is not mentioned in the Treaty, the answer is not obvious. Therefore, we should check that an economic efficiency approach is compatible with the Community legal order.⁹⁹³

In our view, an economic efficiency approach in article 81(1) of the Treaty would comply with the Community legal order. As regards the general Treaty framework, Section 2.2.2. argued that a majoritarian goal (such as consumer welfare) seemed to be more in line with the Treaty's Preamble and articles 2 and 153. Furthermore, Section 2.1. cited Bright's view that article 81(1)'s 'restriction of competition' reference was wide enough to cover a number of approaches. In fact, there is little doubt, that the words 'restriction of competition' could accommodate a consumer welfare test,⁹⁹⁴ especially given the Community Courts' teleological approach to Treaty interpretation. Even if economic efficiency has not been a consistent objective of those applying that provision, we saw that both the Commission and the Community Courts have interpreted it in that way in the past, Sections 2.1.1. and 2.1.2.

The second preliminary issue, which should be discussed, is related to the first. If economic efficiency is to be the underlying article 81(1) test, what type of efficiencies should the Commission pursue? There are many choices, see Chapter One. Should it follow a partial equilibrium or a total welfare model; focus on consumer or producer welfare; and/ or, what balance should it pursue between static allocative efficiency and dynamic, productive and dynamic allocative efficiencies?⁹⁹⁵ Within these, which 'school' of economic thought should it follow?⁹⁹⁶

⁹⁹¹ Schröter (1987), page 645. This is certainly right and is one of this thesis' main underlying arguments, see Chapter Two.

⁹⁹² There are many types of rule of reason, see Section 2. For the purpose of this discussion we take a wide definition, assuming it to be a full economic analysis.

⁹⁹³ Schröter (1987), pages 691 and 692, concluded that it would not be appropriate. His arguments were based on (1) the divergences in the Member States' legal traditions; (2) the lack of legal security that such a change would entail; and, (3) the fact that the Commission alone could, at that time, decide article 81(3) issues. However, since Regulation 1/2003, the whole of article 81 is directly applicable and effective in the Member States' courts and competition authorities. As a result, the risks to homogenous enforcement that he points to in (1) and (3) would arise in any event, as he accepts an efficiency analysis under article 81(3) of the Treaty. The lack of legal certainty, point (2), is discussed below.

⁹⁹⁴ See, for example, Siragusa (1998), pages 470, 547, 565 and 566; Siragusa (1997), pages 284 and 285; Hawk (1995), page 987 and Schröter (1987), pages 691 and 736.

⁹⁹⁵ Duhamel and Townley (2003) discuss other variants of these tests.

⁹⁹⁶ See, Hildebrand (2002), Chapter III; Hildebrand (2002a); Van den Bergh and Camesasca (2001), Chapter 1 and Furse (1996), pages 250-254.

Chapter Five found little underlying consistency uniting the Commission's economic analysis. This lessens the Commission's chance of achieving the aims it seeks; makes it harder for the disparate decision-makers to know what they should be trying to achieve; and, makes the outcome of disputes less predictable for undertakings, see Chapter Eight.

The top priority must be to define the economic efficiency test's underlying objective.⁹⁹⁷ The Community Courts have yet to rule on whether a consumer or a producer welfare standard should be adopted. It is a highly political question, and, as such, outside the scope of this law thesis. Having said that, Chapter One showed that the Commission promotes a consumer welfare standard in its policy statements.⁹⁹⁸

In our view, this is permissible under Community law. The main justification for this approach given today is the wording of article 81(3), which says that "...consumers [must get] a fair share of [the agreement's] resulting benefit..."⁹⁹⁹ This would not be relevant if the efficiency analysis were conducted in article 81(1) of the Treaty. Nevertheless, the Commission may be wise to retain this standard, given what is said below.¹⁰⁰⁰

Chapter Five discussed the relative advantages of a total welfare model over the partial equilibrium approach. Contrary to the Commission's position, we argued in favour of a total welfare model. We thought that this would lead to more accurate welfare assessments,¹⁰⁰¹ as well as being more in line with the approach demanded in relation to the assessment of other Treaty objectives within article 81, see Chapters Four and Seven.

The Commission must also provide rules for how the trade-offs between, for example, static allocative efficiency and dynamic, productive and dynamic allocative efficiencies will be made.¹⁰⁰² Chapters One and Five noted that a consumer welfare standard need not necessarily

⁹⁹⁷ Although these comments must be read in light of Chapter Eight's framework.

⁹⁹⁸ Although, Chapter Five notes that this is sometimes less clear in Commission decisions.

⁹⁹⁹ See, for example, Kjølbbye (2004), pages 566 and 567 and Cseres (2004), page 232. This point was discussed in Chapter Five.

¹⁰⁰⁰ The Commission should not substantially distort its consumer welfare analysis for industrial policy or other aims through market-balancing. In other words, it should not operate a mixed consumer welfare/ producer welfare standard. This is because it is difficult to make the balance predictable and transparent, and the relevant objectives can be achieved through other means. It would be better to use mere-balancing, see Chapter Five.

¹⁰⁰¹ Although we acknowledged that this would lead to a number of evidentiary and other problems. Chapter Five suggested some ways of reducing these.

¹⁰⁰² Chapter Five points to the lack of clarity in Commission decisions in this area. True, it is hard to be clear on where the balance lies between long term (prospective) and short term (often relatively clear) allocative benefits. Two things will considerably improve the current position. First, the selection and implementation of a clear underlying objective, see above. Secondly, greater insistence on the quantification of benefits. There is a risk that this will focus the assessment on allocative benefits because (a) these are easier to establish; and (b) they occur sooner. As allocative efficiency benefits may be outweighed by productive and dynamic efficiencies, care should be taken not to swing the pendulum too far back the other way.

undermine industrial policy goals, where a long-term perspective is taken.¹⁰⁰³ However, to better achieve a consumer welfare goal the Commission should pay more attention to when asserted consumer benefits arise, as well as to their quantum. Chapter Five indicated that Commission, *Article 81(3) Guidelines* go some way towards demanding more precision in this regard. This is to be welcomed. Chapter Eight provides further guidance for this framework.

The Commission must correctly define article 81's objectives, by situating it within a Treaty context, see Chapter Two. Once this has been done, these must be placed within a wider framework of article 81 analysis, see Chapter Eight. Then the Commission must, in agreement with economists, establish the best economic efficiency test to achieve these ends.¹⁰⁰⁴ Whichever welfare standard the Commission adopts, it is imperative that it explains this to undertakings, as well as demonstrating clearly how the standard will be implemented.

Having found that it is *possible* to interpret a 'restriction of competition' under article 81(1) of the Treaty as a restriction of consumer welfare, let us examine the advantages of doing so. The quotation at the beginning of Section 2.3. highlights four key benefits of a welfare approach. First, larger social benefits; secondly, more consistent and predictable enforcement; and, thirdly, simplicity of enforcement. Finally, political stability was mentioned. We assume that this means that there is less room for politically motivated interventions in antitrust decisions. However, this assumes that there is a lot of transparency in the system (so that such interventions would be obvious) and, probably, that welfare is the only goal of competition policy (so that it would be clear that such intervention would be wrong). We have already seen that, in the Community legal order many objectives, outside of welfare are relevant. Nevertheless, the issue of transparency is important and is discussed in relation to the predictability point and also in Section 3 below. We examine the remaining three points in turn below, and then conclude by discussing some other advantages and disadvantages of defining a restriction of competition in this way.

The benefits of having an economic efficiency test are legion. In Massey's words:

"The quest for efficiency is about avoiding or reducing waste. In simple terms, in a world in which not all human wants are currently satisfied and the resources available to us are both scarce and finite, a failure to make the best possible use of resources and avoid waste is

¹⁰⁰³ Having the economic efficiency test under article 81(1) and not (3) may mean that market-balancing can be used to achieve industrial policy aims in a way that article 157(3) of the Treaty would not otherwise permit (which is not to say that we support this, see Chapter Five). Bourgeois and Demaret (1995), page 68, suggest that article 157(3) is justiciable. Article 157(3) states that article 157 "...shall not provide a basis for the introduction by the Community of any measure which could lead to a distortion of competition." If competition is defined as an efficiency test that takes account of industrial policy issues then it might be said that competition is not distorted. Even if this argument works it may be of little concern as article 157(3) has not affected the Commission's approach much, see Part B.

¹⁰⁰⁴ This is a technical question for economists and is not discussed further here.

unacceptable. Inefficiencies involve costs in the form of lower output, and hence less employment opportunities and reduced standards of living for society."¹⁰⁰⁵

A consumer welfare standard would help protect consumers' interests. It should help other policy objectives as well.¹⁰⁰⁶ Chapter One noted that the Commission hopes to promote greater R&D, industrial policy, consumer protection, employment and market integration through its economic efficiency focus.¹⁰⁰⁷ Therefore, adopting an economic efficiency approach within article 81(1), while important in and of itself, should also help achieve these other ends.¹⁰⁰⁸ Indeed, the Commission has said that it will often appear that Community policies in general rely on competition for their effective implementation and that enforcement of the competition rules supports the objectives pursued by these policies.¹⁰⁰⁹

It is particularly efficacious to use, where possible, market forces to achieve these aims. As the Commission itself has pointed out:

"In most areas of Community endeavour, if a policy runs against market forces and competition, it not only has less chance of success, but is also unlikely to benefit consumers. For example, in technology policy, whilst some co-operation in research may be desirable, elimination of effective competition would take away the main spur to innovate and apply new technologies."¹⁰¹⁰

Promoting the welfare assessment to centre stage constantly reinforces the message. Not only because of the beneficial effect of harnessing this mechanism, but because it forces us to reflect on the costs of attempting to undermine it, see Section 3.

The second benefit of the welfare approach, which we need to consider, is the claim that it provides a more consistent and predictable enforcement mechanism.¹⁰¹¹ This is an important claim, and was one of the key weaknesses of the economic freedom test, see Section 2.2.2. But

¹⁰⁰⁵ Massey (1996), page 95. Also see, for example, Korah (2000), pages 9 and 10; Whish (2003), pages 2-6 and B&C (2001), paragraph 1-076.

¹⁰⁰⁶ Consumer welfare's compatibility with the wider Treaty aims is discussed above and in Section 2.2.2.

¹⁰⁰⁷ For example, in relation to: **industrial policy**, Commission, *Framework for State Aids for R&D*, paragraph 1.4; **cultural policy**, Commission, *RCP 1993*, paragraphs 175 and 176; **consumer protection**, Commission, *RCP 1994*, Introduction; **environmental policy**, Commission, *RCP 1993*, paragraphs 163-165; **economic and social cohesion**, Commission, *RCP 1993*, paragraph 154 and Brittan (1992), pages 65-66; **commercial policy**, Commission, *RCP 1993*, paragraphs 180 and 181 and, to a certain extent, **economic freedom**, Neumann (2001), page 183; Fels and Edwards (1998), pages 55-58 and Möschel (1991), pages 15 and 16. See also, Areeda and Hovenkamp (2000), page 4 and Areeda and Turner (1978), page 13.

¹⁰⁰⁸ Chapter One noted that, while this is true in the long-term, there are often short term conflicts. Furthermore, some policies often/ always conflict with a consumer welfare approach. This is discussed in Section 3.

¹⁰⁰⁹ Commission, *RCP 1991*, page 39.

¹⁰¹⁰ Commission, *RCP 1990*, page 16.

¹⁰¹¹ We saw Hawk (1995), page 978, making a similar claim in Section 2.2.2. above.

is it true? Whish and Sufrin thought not, arguing that the current article 81(1) test was more certain.¹⁰¹² Others agree:

"Generally business groups in Europe, just as in America, complain about the lack of certainty in antitrust law. At the same time, they are inclined to demand more flexibility. Such demands are irreconcilable. A rule of reason under article 85(1) [now article 81(1)] would bring about more uncertainty for business men."¹⁰¹³

Commercial agreements take many different forms and operate in a great variety of contexts. The economy is in a constant state of flux. A welfare test (unlike the formulistic economic freedom concept) can provide the requisite flexibility. Flexibility is important, but the real aim must be to achieve flexibility, combined with an appropriate level of certainty.

What about certainty and predictability? Before we can deepen the discussion we must make an important distinction. Uncertainty can be related to what the test is as well as how it is applied, see Section 2.1. Certainty would be markedly increased if the Community Courts clearly said that a 'restriction of competition', in article 81(1), related to consumer welfare, this is discussed above. We argued that less clarity could be engendered in relation to economic freedom, because of the difficulty of explaining the notion of 'undue', see Section 2.2.2.

Having said that, an economic efficiency test does not provide complete certainty vis-à-vis its application. This is because it is dependent upon the value judgments adopted by the decision-maker, see Chapters One, Four and Five, as well as the application of these to the facts. For this reason, those that worry about a lack of certainty are right to highlight this weakness of the welfare notion. Three issues must be confronted:

- Does microeconomic theory work?
- Do the relevant actors understand microeconomic theory?
- Is it feasible for the relevant actors to apply microeconomic theory in every case?

The first problem to confront is whether microeconomic theory works, i.e. can it explain real-world interactions? In general, although not everyone would agree,¹⁰¹⁴ in our view, the answer is yes. Microeconomics provides a coherent set of answers to most of the central questions that antitrust considers,¹⁰¹⁵ which has wide, though admittedly not universal,¹⁰¹⁶ acceptance.¹⁰¹⁷ True,

¹⁰¹² Whish and Sufrin (1987), pages 20 and 37.

¹⁰¹³ Joliet (1967), pages 189-190. See also, Jenny (2000), pages 26-31.

¹⁰¹⁴ See, for example, Ginsburg (1991), pages 26-29; Armentano (1990); Lutz (1989), pages 159 and 160 and Hildebrand (2002), pages 106 and 121, although at page 161 she contradicts herself, saying "...economic theory has developed over the years and provides today an analytical model, which is maybe suited for the specific situation of European competition law."

¹⁰¹⁵ Areeda and Hovenkamp (2000), page 116.

¹⁰¹⁶ See, references in Jenny (2000), page 27, for example.

there is a lack of agreement in relation to some of the precise relationships between competition and innovation, the policy implications of entry barriers and whether vertical integration is harmful. But the great majority of these differences only impact at the margins of antitrust enforcement, as opposed to at the centre. Nearly all of the economic issues relevant to antitrust policy lie at the core.¹⁰¹⁸

The next issue is, even if microeconomic theory generally works, do the relevant actors understand it? Here too, the answer is a qualified yes. When undertakings enter into agreements they, assess the agreements' effect on prices and quality. Therefore, the sort of questions that the consumer welfare test provokes are already well understood by business.¹⁰¹⁹ The same can be said of consumers. Furthermore, as Venit has repeatedly argued, the Commission has a wealth of experience in economic analysis, now that this has become the norm in major merger decisions.¹⁰²⁰ The Member States' courts and competition authorities also have relevant experience now. All the Member States have competition laws and most courts have significant experience of applying economic notions in relation to directly applicable Community law.¹⁰²¹ As a result, the adoption of an economic efficiency approach, if properly explained, should enhance the coherence and predictability of decisions, as it is already well understood by most of the relevant actors.¹⁰²²

But, even those that accept what has been said thus far might say that reliance on a consumer welfare standard places a heavy burden on the decision-maker. Courts and competition authorities have neither the knowledge nor the time to conduct a cost benefit analysis both within and without the relevant markets in every case.¹⁰²³ Such analysis may be reasonably predictable in theory, but in practice it is far from simple. Uitermark agrees. Competition is complex and he warns against ready-made answers. In his view:

¹⁰¹⁷ Verouden (2003), page 538; Areeda and Hovenkamp (2000), pages 116 and 117 and Scherer (1992a), pages 501-509.

¹⁰¹⁸ Areeda and Hovenkamp (2000), pages 116-118.

¹⁰¹⁹ That is not to argue that every corner store actually carries out a welfare analysis before pricing the carrots it will sell, but, implicitly, this is essentially what they do and so the concepts are relatively easily understood.

¹⁰²⁰ Venit (2003), pages 551 and 552 and Venit (1998), page 569.

¹⁰²¹ As Gyselen points out, the Member States' courts are often called upon to conduct economic analysis already "...there is no fundamental *conceptual* difference between the economic assessments [we suggest under article 81(1), although he was discussing them under article 81(3)]...and those to be undertaken under the directly applicable provisions of article 81(1), article 82 or article 86(2) EC. Nor does the degree of complexity involved in these assessments differ.", Gyselen (2002a), page 183.

¹⁰²² See, Mario Monti (2003), part III and Ehlermann (1998), pages ix, 324, 327, 355, 463 and 464.

¹⁰²³ See, for example, Petersmann (2003), page 52; Jenny (2000) and Easterbrook (1992), pages 119-129.

"...each individual case should be judged on its own merits, using all economic insights that are presently available."¹⁰²⁴

Even if such analysis were possible, is it practicable?¹⁰²⁵ The point is a good one; indeed it is one of competition policy's main challenges.¹⁰²⁶ But it should not be exaggerated.¹⁰²⁷ Lawyers' concern for legal certainty can be mitigated by the development of an integrated, step-by-step approach to decision-making.¹⁰²⁸ This should involve the use of presumptions,¹⁰²⁹ negative block clearances,¹⁰³⁰ *per se* rules¹⁰³¹ and market share filters.¹⁰³² The *De Minimis Notice* and the *Vertical Restraints Block Exemption* already employ market share filters, for example, and the Community Courts support their use. Economists would have to advise on the use of *per se* rules. The examples of conduct listed in article 81(1)(a)-(e) of the Treaty are already effectively treated as such (at least within article 81(1)), and might be extended, if appropriate.¹⁰³³ Finally, more efforts might be made to increase the expertise in economics available to the decision-makers.¹⁰³⁴

¹⁰²⁴ Uitermark (1996), page 13.

¹⁰²⁵ Korah (2002), page 24; Jenny (2000), page 28 and Korah (1981), pages 348 and 349.

¹⁰²⁶ Faull (1998), pages 503 and 505.

¹⁰²⁷ Gyselen (2002a) and Korah (1998), page 487.

¹⁰²⁸ Van den Bergh (2002), page 51 and Korah (1998), page 487.

¹⁰²⁹ Faull (1998), page 489.

¹⁰³⁰ Siragusa (1998), pages 555-557. In the UK, for example, virtually all vertical agreements fall outside of our equivalent to article 81(1) of the Treaty, see OFT, *Vertical Agreements and Restraints* and references made there. Note, there is currently a debate about removing the UK exception for vertical agreements, see Waelbroeck (2004), page 3.

¹⁰³¹ Hawk and Denaeijer (2001), pages 132-134; Heimler and Fattori (1998), page 597; Hawk (1995), page 988; Easterbrook (1992), pages 129-132 and Williams (1989), page 23.

Manzini (2002), pages 398 and 399, points out that the ECJ in the *Matra Case*, paragraph 85, held that, in principle, no anti-competitive practice could exist which could not be exempted, *as long as it complied with the article 81(3) criteria*. He took this as an argument against *per se* economic rules, saying that agreements can always be exempted under article 81(3) of the Treaty. But this is wholly dependent on what the ECJ analyses under article 81(1) of the Treaty and what article 81(3)'s criteria refer to. If we decide to do all economic analysis under article 81(1), then the agreement can be exempted under article 81(3), even if it fell foul of a *per se* rule. However, it would be in line with the caselaw to say that an exemption could not be considered on economic grounds, but, for example, environmental protection, or whatever factors were considered relevant under article 81(3) of the Treaty.

¹⁰³² Jenny (2000), pages 28 and 29; Hawk (1995), pages 978, 979 and 987-988 and Easterbrook (1992), page 130. Recently, Monti (2004), page 407, has said that today "...market power is a crucial element to take into account in applying article 81..."

¹⁰³³ As, under this suggestion, welfare analysis would no longer be considered under article 81(3) of the Treaty, these rules might be better seen as presumptions that the party relying on article 81(1) can use, but which could be rebutted under certain conditions. Although Easterbrook (1992), pages 129 and 130 questions even this "Even proof that a practice saves customers 'millions of dollars' every year does not justify case-by-case inquiry, once the practice is located in a group likely to be harmful."

¹⁰³⁴ Williams (1989), page 23.

These measures are not ideal,¹⁰³⁵ but they enhance certainty while providing flexibility, and can be more efficient in the long term.¹⁰³⁶ This should reduce compliance costs. This is important.¹⁰³⁷

Adoption of an economic efficiency standard does create some difficulties.¹⁰³⁸ Much work has to be done before it works smoothly. Having said that, we must not lose sight of the potential benefits. We must also seek the right blend of flexibility and certainty. In our view, economic freedom cannot provide this. Consumer welfare may not be perfect, but it is better than most other concepts.¹⁰³⁹ It also has relative success in other jurisdictions, such as the US, where it is already used.¹⁰⁴⁰

As pointed out above, one can also tolerate a certain amount of uncertainty, as long as the underlying objective being pursued is important enough. There is no doubt that economic efficiency has been interpreted as an important Treaty objective, especially in relation to article 81.

"As regards legal certainty, such an approach [one that is functionally somewhat like the US rule of reason] entails the realistic acceptance of a substantial but tolerable level of uncertainty - a level with which many businessmen are perfectly willing to live."¹⁰⁴¹

In conclusion, adopting consumer welfare as the article 81(1) objective, as opposed to economic freedom, could, depending upon the statements of the Community Courts and the Commission, help clarify the application of this paragraph. To the extent that ambiguity persisted, at least it would be in the name of an important objective that, in the long term, would help us achieve other Treaty objectives too.

¹⁰³⁵ For example, in relation to the difficulty of defining market power, see Jenny (2000), page 29 and Schroeder (1997).

¹⁰³⁶ See, for example, Easterbrook (1992), pages 129-130.

¹⁰³⁷ Moussis (2000), page 287.

¹⁰³⁸ Another problem that those in favour of economic freedom highlight is that, from a liberal perspective, competition rules also protect competition as a discovery procedure and as a mechanism for limiting abuses of power, i.e. protection of competition as a process. However, the same can be said of welfare analysis, unless one takes an extremely short-term perspective. Chapter One emphasises that competition must be seen as a dynamic (and not a static) mechanism. If short-term gains are delivered and these will eliminate competitors in the long-term, then welfare will likely be undermined in the long-term too.

¹⁰³⁹ "...notwithstanding their vagueness, economic standards provide more legal certainty than populist and other elements, as well as the possibility of *ex post* empirical assessment.", Castañeda (1998), page 51 and "Modern competition theory and case law have provided better tools [than the economic freedom test] based on the assumption that the protection of a system of workable competition is at issue.", Schaub (1998), page 124.

¹⁰⁴⁰ Furthermore, those that criticise the presence of welfare within article 81(1) must be wary if, like Whish, Sufrin and Marengo, see above, they are prepared to consider it under article 81(3) of the Treaty. It is questionable whether consigning it to article 81(3) increases certainty as it will have to be considered in any event. In fact if the article 81(1) test is wide (so that potentially more agreements must be considered under an economic efficiency test) then this may increase uncertainty.

In our view, there are three other advantages of defining a 'restriction of competition' under article 81(1) of the Treaty, as (an appreciable) restriction of consumer welfare. The first point is that competition systems are increasingly placing greater emphasis on the economic efficiency test, and the consumer welfare test in particular, Chapter One. Following this lead in the Community would have many benefits, such as improving and facilitating co-operation between competition authorities and reducing the regulatory burden for Community undertakings, see Section 2.2.2. above.¹⁰⁴²

Secondly, this should reduce the amount of competition authorities' work,¹⁰⁴³ freeing up time for them to focus on serious article 81 infringements, as well as more sensitive, political, cases.¹⁰⁴⁴ Since 1 May 2004 the Commission has theoretically been able to do just that. However, the Regulation 1/2003 has, to a large degree, transferred the Commission's burden to the Member States' courts and competition authorities. Many have received only small budget increases. As a result, they now have less time to focus on serious infringements. Embracing the consumer welfare standard within article 81(1) would benefit them and, as a result, probably improve the quality of their decision-making, as they will have more time.

Finally, adopting a consumer welfare test within article 81(1) of the Treaty will narrow its scope. This means fewer agreements will fall within the provision. This reduces Community undertakings' compliance costs. Not through a relaxation in the desire for competition, however. But, rather it means a redefinition of the test, so that it better focuses on the agreements that matter.¹⁰⁴⁵

One weakness of this position should be discussed. Manzini argues that the adoption of a consumer welfare test within article 81(1) of the Treaty would undermine the explicit wording of article 81(1)(a)-(e). He believes that these provisions rule out an economic balancing act. In his view, they demand an examination of the specific effects of an agreement, regardless of whether this has positive welfare effects.¹⁰⁴⁶

This is a powerful criticism. One response could be that, the reason why the Treaty lists these five examples is not because such acts are wrong *in themselves*. These acts are seen as wrong

¹⁰⁴¹ Forrester and Norall (1984), page 17.

¹⁰⁴² This would especially be the case if all jurisdictions adopted a total welfare model, see, for example, Fox (1998a), pages 8, 11 and 12 and the discussion in Chapter Five.

¹⁰⁴³ Korah (2000), page 10.

¹⁰⁴⁴ Siragusa (1997), pages 285 and 286.

¹⁰⁴⁵ Ehlermann (2001), page 285.

¹⁰⁴⁶ Manzini (2002), pages 394-395. See also, Case T-14/89, *Montedipe v. Commission*, [1992], paragraph 265. Others also argue that article 81 as a whole focuses on anti-competitive *conduct*, whereas in articles 82 and 87 of the Treaty, for example, the *results* of the actions are expressed as a separate criterion.

because of the effects that they are likely to have, for example on welfare. In other words, they are examples of types of restriction that are normally welfare reducing and thus can normally (but are not always) be presumed "wrong" in a per se fashion. This response is justified because, in the Community legal order, the ECJ has held that the first principal of interpretation is to look at the ordinary meaning of the word in its context and in light of the objectives of the Treaty, see also Chapter Two.¹⁰⁴⁷ In other words, Treaty provisions are interpreted in light of the effect that certain conduct has *on the achievement of the Treaty's objectives*. This implies that one should not focus merely on the conduct itself.

The approach to the notion of lack of appreciability provides one example of this kind of thinking.¹⁰⁴⁸ The Community Courts and the Commission read into article 81 the idea that the five examples in article 81(1) are only relevant in the event that agreements that breach them have a certain effect.¹⁰⁴⁹ In other words, an agreement between two SMEs that, for example, led to price discrimination, article 81(1)(d) of the Treaty, may well fall within this 'exception' because it is not perceived as having an important welfare effect. Thus, it would fall outside article 81(1).¹⁰⁵⁰ Agreements between SMEs are just as capable of price discriminating as those of any other economic actors. But this is a problem only insofar as it leads to welfare effects.¹⁰⁵¹

2.4 Conclusion of Section 2

Companies can reasonably expect an adequate level of predictability and consistent application of the competition rules that allows them properly to assess how they will be applied.

There is considerable disagreement as to what article 81(1) of the Treaty means by "...prevention, restriction or distortion of competition..." The expression is unclear. Neither the Treaty, nor the Community Courts, nor the Commission define the term with sufficient clarity (or consistency) such that it can be applied by undertakings. This is unacceptable.

¹⁰⁴⁷ Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982], paragraph 9.

¹⁰⁴⁸ One might also think of the ancillary restraints doctrine as extended to article 81 agreements, see, for example, Case 42/84 *Remia v. Commission* [1985].

¹⁰⁴⁹ See, for example, the *De Minimis Notice* and Case 5/69 *Franz Völk v. Établissements J. Vervaecke* [1969], paragraphs 5/7. See also, Bright (1995), pages 508 and 509, who, commenting on the previous case, said "Very probably what is being sought is a reduction in competition that has a consequence for the satisfactory operation of the market."

¹⁰⁵⁰ Admittedly, the Commission's *De Minimis Notice* does not apply where certain hardcore restraints are included within an agreement, paragraph 11. However, this list does not contain all the items in article 81(1)'s list. Furthermore, the *de minimis* doctrine can still apply even where there is a hardcore restraint. See, Case 5/69 *Franz Völk v. Établissements J. Vervaecke* [1969], paragraphs 5/7, "Thus an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in article 85(1) [now article 81(1)]." See also, Case 1/71 *Société Anonyme Cadillon v. Firma Höss* [1971], paragraph 9 and Case 306/96 *Javico International and Javico v. Yves Saint Laurent Parfums* [1998], paragraph 17.

¹⁰⁵¹ A similar comment could be made in relation to the *Nungesser Case* and article 81(1)(c) of the Treaty.

We sought appropriate guiding principles that properly balance the need for legal certainty with the flexibility required for governing an economy in a state of constant flux. Our analysis was conducted in light of article 81(1)'s place within the Treaty, as interpreted by the Community Courts today.

We considered the notion of economic freedom first. There is dispute about whether economic freedom is used as a way of achieving economic efficiency objectives, or as an end in itself. If it is an indirect way of achieving consumer welfare, it would be better to apply an economic efficiency test directly. Where economic freedom is used as a value in itself the argument is more complex. There are practical reasons why, in the past, interpreting a 'restriction of competition' as a restriction of economic freedom has been beneficial. However, we found that the main arguments in favour of maintaining this concept today were misplaced. In part, this was due to problems in applying the economic freedom test, not least of which was the difficulty of placing coherent limits on the notion. We decided to search for a concept that was more in line with the Treaty's objectives, one that could be applied more clearly and consistently.

Economic efficiency is an appropriate concept. It 'fits' within the Community legal order, and particularly within article 81(1) of the Treaty. It has already been used there by the Commission, the Community Courts and certain Member States' competition authorities. We noted the benefits that would result from such a change, both direct and indirect, see Chapter One. It would provide the flexibility that business needs, with a tolerable level of legal certainty. It would bring us into line with other competition authorities, reducing Community firms' compliance costs. Finally, a consumer welfare standard would also have a positive effect on consumers.

We agree with the Commission that a consumer welfare standard would be acceptable under the Treaty. Having said that, it is a wide concept and we call on the Commission to define the notion in more precise terms, we made some suggestions in this regard. A full economic analysis would be too costly to apply in every case, so market share thresholds, per se rules and other filters should be used to ensure that article 81(1) only bites where competition concerns arise.

The Commission has expressed concern that defining a 'restriction of competition' as a restriction of consumer welfare could not be done without the support of the Community Courts or a Treaty amendment, see above. The ECJ should overrule the CFI's *Métropole télévision* judgement on this point at the first opportunity. As long as they do so clearly and unequivocally

then, there is no need to amend article 81(1) of the Treaty, indeed the flexibility of this notion may prove useful in the future.¹⁰⁵²

Other countries look to the US and Europe for antitrust leadership.¹⁰⁵³ The adoption of clear and similar tests by the relevant authorities would send a strong signal to other jurisdictions about the benefits of this approach. This is not to deny that the US and Community antitrust provisions must be read in different contexts. For this reason, Section 3 affirms the importance of public policy considerations. The greater clarity that this change to article 81's underlying test would promote would also give us more credence when seeking to persuade developing countries to enact clear and transparent competition legislation of their own.¹⁰⁵⁴

3. MERE-BALANCING IN ARTICLE 81(1) OF THE TREATY?

Part B showed that conflicting Treaty objectives have been balanced in both article 81(1) and article 81(3) of the Treaty. There was no consistency in when and where the objectives could be and were invoked.¹⁰⁵⁵ Section 3 seeks to impose some order.

Komninos suggests that:

"...article 81 EC *as a whole* should be balanced against public interest concerns. In this sense, the non-economic norm (in *Wouters* the protection of the legal profession's independence) is not brought *into the substance of article 81 EC* (in its first or in its third paragraph), thus blurring its purity, but it is taken into account at a preceding stage, leading to an exception from the ambit of article 81 EC as a whole, subject to a control of proportionality."¹⁰⁵⁶

The problem with this suggestion is that it is impossible at law. When one applies article 81, there is not a step where one can weigh the provision *as a whole* against public policy objectives. One must apply first article 81(1) of the Treaty and then, if necessary, article 81(3). It is a two step process.¹⁰⁵⁷ While Komninos' suggestion seems attractive, it is unworkable from a legal perspective.

¹⁰⁵² However, given the general nature of the specific list of prohibitions, article 81(1)(a)-(e), and the fact that whether or not a particular behaviour is anti-competitive depends on the context in which restrictions operate, it is now time to remove this list, see also, Massey (1996), pages 101-103.

¹⁰⁵³ Kolasky (2004), page 53.

¹⁰⁵⁴ Kolasky (2004), page 53 and Townley (2004), pages 130 and 131.

¹⁰⁵⁵ Deckert (2000), page 176.

¹⁰⁵⁶ Komninos (2005) DRAFT, page 11. Schmid (2000), pages 166 and 167, also considers this option, although he rejects it.

¹⁰⁵⁷ Idot (2001), page 336, "...it is confusing to say that the Commission would have to take a global approach, whereas the structure of article 81 requires reasoning in two stages."

In our view, non-economic objectives are best considered within article 81(3) of the Treaty. Mere-balancing should be restricted to that paragraph.¹⁰⁵⁸ Why? Chapter One discusses 'exclusion's' benefits at length.¹⁰⁵⁹ Conducting mere-balancing in article 81(1), reduces consumer welfare, decreases transparency, undermines the Commission's corporate social responsibility initiatives and ignores article 81's structure. This is unnecessary; there is no need for mere-balancing within article 81(1). Indeed, the best place for mere-balancing is article 81(3) of the Treaty.

Delegation theory tells us that the objectives assigned to a competition law might be more completely achieved if drawn narrowly. Increases in consumer welfare are most likely where this is the only objective considered within article 81(1) of the Treaty. Consumer welfare's benefits were discussed in Chapter One and Section 2. It also helps reinforce the market mechanism. Furthermore:

"Separating the objective of the four freedoms, including competition law, from other objectives of the Treaty could lead to a more expeditious creation of a real internal European market, with its advantages of economies of scale and scope."¹⁰⁶⁰

Secondly, if only one objective needed to be considered in the article 81(1) analysis, then the application of the provision would be more transparent. Increasing transparency is important. It helps:

- reveal the non-economic objectives' costs; and,
- improve legal predictability for relevant bodies.

Whenever non-economic objectives are achieved at the expense of consumer welfare there is a cost. This does not mean that resolving the balance in that way was necessarily wrong. Indeed, the reservation of article 81(3) for balancing non-economic objectives sends a clear message that, in certain circumstances, this is permissible. However, in order to assess whether or not to promote a conflicting non-economic objective, one must know the cost of the decision. Using article 81's structure to clearly separate the economic and non-economic considerations should force the decision-maker to demonstrate and justify the sacrifices, judgments and trade-offs it favours.¹⁰⁶¹ Knowing the cost of political intervention is important.¹⁰⁶² It increases

¹⁰⁵⁸ This does not mean that an *Albany* style analysis should not take place within article 81(1) of the Treaty, where necessary (although this should be kept to a minimum). Remember that, in the *Albany Case*, discussed in Chapter Two, the ECJ did not balance competing objectives, but said that article 81(1) simply did not apply to certain types of agreements.

¹⁰⁵⁹ Although the rejection of mere-balancing in article 81(1) is not a rejection of compromise, because this can, and should, take place within article 81(3) of the Treaty, see Chapter Seven.

¹⁰⁶⁰ Kirchner (1998), page 522.

¹⁰⁶¹ Lipsky (1998), page 458 and Ginsburg (1991), page 25.

accountability,¹⁰⁶³ which should force a better articulation of the competing policies. This, in turn, strengthens the position of the voter.¹⁰⁶⁴

Transparency also means increased legal predictability for undertakings.¹⁰⁶⁵ Chapter Three showed that mere-balancing within article 81(1) of the Treaty reduces the clarity of the provision, it makes it less clear whether, or not, article 81(1) of the Treaty applies.¹⁰⁶⁶ Even if the Commission and the Community Courts made every effort to explain their reasoning (which they do not, see Chapters Two and Three) the outcome of the balance would always be in doubt.¹⁰⁶⁷ Chapter Two emphasises the importance of clarity to business and to the economy as a whole. It helps undertakings plan for the future. But, there is another benefit, which would also apply to consumers or others who might make use of the antitrust laws. Increased clarity reduces frivolous litigation. Ambiguity makes aggressive litigation on competition grounds easier.¹⁰⁶⁸ Those that want to claim that an agreement (or clause) is void under article 81(2) of the Treaty have more (potential) grounds of attack. Those that wish to defend the agreement have more (potential) grounds for defence. Regardless of the merits of the case. This increases litigation risks (also making what litigation there is more lengthy and complex),¹⁰⁶⁹ augmenting business (and consumer) uncertainty. Welfare is further reduced.¹⁰⁷⁰ This could, amongst other things, undermine the Treaty's aim of raising the standard of living, article 2.

Restricting article 81(1) to a pure consumer welfare analysis also supports the Community's stance on corporate social responsibility for undertakings, Chapter One. A key part of the Commission and Council's strategy in this area is to encourage firms, *on a voluntary basis*, to co-operate (within the limits of the law). If other objectives are relevant within article 81(1) of

¹⁰⁶² Wolf (1998), page 132; Möschel (1991), page 12 and Ginsburg (1991), page 25. The desire for transparency and accountability in the decision-making process has been cited as the reason for the Community Courts' application of articles 81 and 82 (in conjunction with articles 3(1)(g) and 10 of the Treaty) to Member States, see Möschel (1991), page 12.

¹⁰⁶³ Neven (1998), page 22.

¹⁰⁶⁴ Kirchner (1998), page 522.

¹⁰⁶⁵ Schmid (2000), page 166.

¹⁰⁶⁶ How many of us would have predicted the ECJ's decision in the *Wouters Case*, for example? See, Forrester (2005) DRAFT, page 17.

¹⁰⁶⁷ Jebesen and Stevens (1995-6), page 460. On the lack of clarity in a mere-balancing approach in general see also, Baxter (1983), page 621, and the references cited there, as well as Chapter One. Chapter Eight advises on how to improve predictability within mere-balancing.

¹⁰⁶⁸ Riley (1998), page 485.

¹⁰⁶⁹ Korah (2002), page 25.

¹⁰⁷⁰ These reductions can be important, although they are small in relation to the benefits to the economy of competition policy, Gardner (2000). The smaller they are the better, provided that this is not achieved at the expense of an even larger loss to society as a whole, COM(96) 721, paragraph 86. For a brief indication of some business costs related to possible changes in the UK competition regime see, DTI (2002), pages 13-15.

the Treaty, then where undertakings sought to co-operate so as to increase welfare, they could be *forced* to implement other Treaty goals, such as development policy. The same would apply, for example, if they had an environmental agreement that did not appreciably restrict competition. This runs contrary to the CSR initiative as a voluntary scheme. Co-operation becomes less attractive, which could reduce the other benefits to be gained through encouraging these kinds of agreements, see Chapter One.¹⁰⁷¹

These benefits are important, but they would not be decisive if by removing the consideration of non-economic objectives to article 81(3) would undermine the aims of the Treaty. It does not. There is no need for mere-balancing in article 81(1) of the Treaty; indeed article 81(3) is the best place for it. We now consider these points in turn.

Since Regulation 1/2003,¹⁰⁷² there is no need for mere-balancing in article 81(1) of the Treaty. Chapters Two and Four showed a vast array of objectives being considered in article 81(3).¹⁰⁷³ Where an agreement restricts competition (reduces consumer welfare), then it could still be exempted if it fulfilled article 81(3). In addition, exempting agreements due to policy considerations under article 81(3), better reflects article 81's structure, see Chapter Three.¹⁰⁷⁴ Although in practice they have sometimes wavered, the Community Courts¹⁰⁷⁵ and the Commission¹⁰⁷⁶ now seem to agree that, in theory, mere-balancing is better conducted under article 81(3) of the Treaty. Legal scholars tend to support this view, see Chapter Three.¹⁰⁷⁷

Wesseling points out that such a change would make exemption harder because the agreement would have to fulfil all four article 81(3) conditions, as opposed to just outweighing the

¹⁰⁷¹ One could make the same point in relation to any legislation that 'forced' firms to comply with, for example, environmental standards. However, the issue is somewhat different here as article 81(1) only applies where there is some form of co-operation, which is the basis of CSR too.

¹⁰⁷² Chapter Two suggested that one reason lying behind the ECJ's *Wouters* and *Albany* judgments may have been the procedural repercussions of finding restrictions of competition in the underlying agreements which had not been exempted (they would have been void under article 81(2) of the Treaty). As mentioned there, agreements no longer need to be notified to the Commission so these procedural problems no longer arise.

¹⁰⁷³ Monti (2002), section 5.2., argues that Member States' objectives cannot be considered in article 81(3) of the Treaty. However, Chapter Seven disagrees.

¹⁰⁷⁴ Schmid (2000), page 166. Furthermore, article 157(3) of the Treaty also implies that balancing should take place in article 81(3).

¹⁰⁷⁵ Case T-112/99 *Métropole Télévision (M6) and Others v. Commission* [2001], paragraph 74 and the *Wouters Case*, see the opinion of Advocate-General Léger, paragraphs 100-108. Although Jans (2000), page 275, says that it is unclear what the Community Courts will say after the *Albany Case*. The same might be said of the *Wouters Case* too, see Vossestein (2002), pages 858 and 859.

¹⁰⁷⁶ See, Commission decision, *Joint selling of the commercial rights of the UEFA Champions League*, paragraphs 129-131; the *Albany Case*, see the reference to the submissions of the Commission, paragraph 175 of the opinion of Advocate-General Jacobs and Commission, *RCP 1992*, paragraph 77.

¹⁰⁷⁷ Some Community competition authorities interpret their equivalent of article 81 in this way too, see Section 2.

restriction of competition.¹⁰⁷⁸ This is because article 81(1) does not demand that consumers get a fair share of the resulting benefit, etc. Wesseling makes an important observation, but it should not be exaggerated. Chapter Three showed that some of these tests have been introduced into article 81(1) too.¹⁰⁷⁹ Nevertheless, Wesseling is right insofar as article 81(3)'s clear articulation of four conditions may make exemption more difficult.¹⁰⁸⁰ At the very least, it forces those conducting the balance to consider the effect on consumers, as well as the effect on competition. Given the importance of the consumer welfare test, this should be positive. In other words, if exemption under article 81(3) of the Treaty is more difficult, then this weighs in favour of restricting exemption to that paragraph. This argument gives some weight to Chapter One's point about competition law not being the most efficient instrument to promote many non-economic objectives. However, it does not abandon compromise altogether, as article 81(3) of the Treaty can normally be used for this.

There is one situation in which it potentially makes a great deal of difference whether balancing takes place under article 81(1) or 81(3) of the Treaty. Consider an agreement that would not have been considered restrictive of competition, for the purposes of article 81(1) of the Treaty (for us this means that consumer welfare is not appreciably restricted), except for the fact that it infringed some other Treaty objective. This sort of (negative) mere-balancing is not normally performed within article 81(1), although protection of SMEs¹⁰⁸¹ and the market integration objectives sometimes operate in this fashion.¹⁰⁸²

¹⁰⁷⁸ Wesseling (2000), pages 106 and 107.

¹⁰⁷⁹ Chapter Three showed that when balancing takes place in article 81(1) an indispensability test is often implied. Indeed, in the *Wouters Case* the ECJ probably used a full-blown proportionality test. Furthermore, we have seen that article 81(3)'s *fair share to consumers* test is used to justify a consumer welfare test there. If consumer welfare were already relevant within article 81(1), then all article 81(3)'s four tests would be present within the first paragraph, except that competition could be eliminated. It is unlikely that the Community Courts or the Commission would allow competition to be eliminated even when balancing under article 81(1) of the Treaty.

¹⁰⁸⁰ Commission, *Article 81(3) Guidelines*, reinforce this approach. They seem to place a heavy burden of proof on the parties wishing to benefit from article 81(3), while narrowing article 81(1)'s interpretation, see Geradin (2004), page 14.

¹⁰⁸¹ Although more recent versions of the *de minimis* notices have introduced a market share test too. Agreements between firms are not merely exempted where the undertakings that enter into them are small. The market share test, see the *De Minimis Notice*, paragraph 7, is analysing something else as well, i.e. the agreement's impact on the market, see the *De Minimis Notice*, paragraph 1. If a consumer welfare became the declared objective of article 81(1) an appreciability test would still be relevant.

¹⁰⁸² Whish and Sufrin (1987), page 37, argue that those in favour of "...the rule of reason fail to give due consideration to the significance of single market integration." Marsden (2000) implies the same thing. However, Chapters One and Three: (1) suggested that the market integration objective may be there to enhance economic efficiency; and, (2) noted that the market integration objective, as currently pursued, may actually undermine market integration in ways that a welfare standard would not. In any event, although the market integration imperative is unlikely to disappear in the near future, since achievement of the single market it has been less important as a policy goal. Nevertheless, Whish and Sufrin's point is worth pursuing because it may be that market integration is not solely there to achieve efficiency aims. Furthermore, other objectives may also be considered

If mere-balancing were prevented in respect of this kind of 'negative' objective would the Treaty's aims be fully achieved?¹⁰⁸³ What if there were an agreement that did not restrict competition but was particularly destructive to the environment? If the agreement were cleared under article 81(1), would this comply with the Commission's obligation to ensure a high level of environmental protection in its definition and implementation of Community policies? In other words, in the Treaty context, does restricting balancing to article 81(3) sufficiently accommodate the need for compromise, or does it give competition too much weight?¹⁰⁸⁴

The answer is probably not, for four reasons.¹⁰⁸⁵ First, we suggest defining a restriction of competition as an appreciable restriction of consumer welfare. Consumer welfare and the public interest overlap to a large degree.¹⁰⁸⁶ Externalities can be internalised. Even where this has not been done, many other objectives are directly and indirectly promoted through the consumer welfare concept. As a result, the standard we suggest actually incorporates many relevant objectives within it and so reduces the problem of conflict, at least in the long term.

Secondly, agreements that cause no competition problems, but cause environmental damage, for example, should be dealt with through environmental legislation. Article 81 is not a blank cheque to legislate in all areas. The absence of environmental legislation cannot be used as an excuse for pursuing environmental policy through competition law. It is up to the Council and the European Parliament to adopt environmental legislation. Allowing the Commission (or a Member State court, for example) to bypass them in this way would undermine the separation of powers under the Treaty¹⁰⁸⁷ and distort the competition rules from their true purpose.

Furthermore, administrative action would become impossible if every decision had to take account of its effect on every relevant objective. This cannot be the intention of the Treaty. In

within article 81(1) which may conflict with competition, think of the *Wouters Case*, discussed in Chapter Two (although that was not an example of 'negative mere-balancing').

¹⁰⁸³ Ehlermann (1998), page 4, notes this problem in relation to the international harmonisation of competition laws.

¹⁰⁸⁴ One might also comment that interpreting a restriction of competition as a restriction of consumer welfare (instead of economic freedom) means that article 81(1) is interpreted more narrowly, see Section 2. As a result, it applies to less agreements. Therefore, there is less opportunity to invoke other policy objectives (for example within article 81(3)) in relation to agreements. However, if arguments like this held sway, we could be forced to apply article 81(1) to all agreements. The fact that the Community Courts accept an appreciability test implies that this need not be so.

¹⁰⁸⁵ Vogelaar (1994), pages 542 and 543, argues that environmental considerations can only be raised under article 81(3) of the Treaty "...since the test of article 85(1) [now article 81(1)] is a strictly legal and economic one..." He cites two cases to support this, including *Case 5/69 Franz Volk v. Établissements J. Vervaecke* [1969]. But this is a circular argument and depends on the definition of 'restriction of competition'. Furthermore, he is not supported by the later caselaw, think of the *Wouters Case*, for example.

¹⁰⁸⁶ See Chapter One and Howe (1998), page 450.

¹⁰⁸⁷ Vedder (2003), page 158.

any event, most agreements between undertakings that restrict competition are found to fall outside article 81(1) of the Treaty. Normally this is either because they do not fulfil article 81's jurisdictional tests or because they are not appreciable. These minor agreements would likely cause little environmental damage or consumer harm.¹⁰⁸⁸ The benefits of balancing under article 81(1) of the Treaty would not be great in most of these cases.

Finally, in the rare cases where non-economic objectives are significantly undermined by such an agreement, these objectives are normally more effectively protected through direct legislation that does not distort competition.¹⁰⁸⁹ Allowing mere-balancing within article 81(1) of the Treaty may even undermine the very objectives that we seek to promote. This is because this reduces the Member States' incentives to deal with problems using optimal instruments, see Chapter One.¹⁰⁹⁰

One might add that if mere-balancing takes place in article 81(1), what is left to be considered in article 81(3)?¹⁰⁹¹ Some may suggest, in light of *Métropole télévision*, that economic efficiency should be considered under article 81(3) of the Treaty. It would be a topsy-turvy world where a competition law only considered economic efficiency as being a justification for otherwise unacceptable agreements.

This sort of (negative) mere-balancing is not normally performed within article 81(1) of the Treaty. The market integration objective sometimes operates in this fashion, but is increasingly less important and may even be promoted by efficiency enhancing agreements. Furthermore, the problem we have discussed rarely arises today and so the change we advocate, in fact, makes little difference. On the other hand, a clear article 81(1) test produces many benefits everyday, these have been highlighted above. It would also be difficult to set a limit on the invocation of non-economic objectives if they could be considered even if article 81(1) were not otherwise breached. Therefore, we are prepared to allow the tiny minority of agreements that would prejudice other Treaty objectives to pass through article 81(1) of the Treaty unscathed. It seems a worthwhile price to pay.

¹⁰⁸⁸ Chapter Eight discusses application of the appreciability doctrine to non-economic Treaty objectives.

¹⁰⁸⁹ Monti (2002), page 1092, points out that "...increased activism by the EC in other policy areas reduces the need for competition law to intervene to achieve other goals..."

¹⁰⁹⁰ One cannot rely too heavily on this argument, otherwise the policy-linking clauses would be of no value. It would also allow us to forbid balancing under article 81(3) of the Treaty. However, the argument is relevant insofar as it shows that the non-economic objective can invariably be (better) protected by other means. Therefore, critical damage can still be prevented.

¹⁰⁹¹ One option could be that article 81(1) is a 'quick check' and article 81(3) is a more thorough look, like Phase I and II under the ECMR. However, there is no support for this in article 81. Paragraphs 1 and 3 seem designed to deal with different issues, Whish (1998), pages 464 and 500, particularly in light of article 81(3)(b) of the Treaty.

4. CONCLUSION OF CHAPTER SIX

Monti has said that companies can reasonably expect:

"...an adequate level of predictability and consistent application of the rules that allows them properly to assess how the rules will be applied."¹⁰⁹²

Part B showed that article 81 is far from clear in this regard. This is a scandal.

There are two main problems with the way in which article 81(1) of the Treaty is implemented, as far as the consideration of non-economic objectives within article 81 is concerned. The first relates to the imprecise definition of a restriction of competition. The second relates to the lack of clarity generated by mere-balancing within article 81(1), see Chapter Three.

Regulation 1/2003 does not mean that the wide reach historically given to 81(1) ceases to be important. Nor does it remove the need to clearly define article 81(1)'s scope; or, obviate the problems caused by mere-balancing in that provision. In fact, these issues have, arguably, become more important. Why? Undertakings can no longer protect themselves from fines through notification to the Commission; and, because article 81 actions are likely to become increasingly common.

Chapter Six is not suggesting that we become hostages to clarity. Chapter Two showed that many Treaty objectives should be balanced within article 81. This is not a science. The compromise requirement does not mean, however, that all Treaty objectives need to be directly considered all of the time and at every stage of the proceedings. This would create too much uncertainty and involve too much cost for insufficient return. This is one reason why we largely reject the use of market-balancing, see Chapter Five.

Section 2 argues that the notion of a restriction on economic freedom is unclear; that the arguments in favour of economic freedom are unpersuasive; and, that this definition has certain negative consequences. It suggests adopting an economic efficiency test. Section 3 adds that there is no need for mere-balancing within article 81(1). Furthermore, the benefits of performing the mere-balance in article 81(3) instead suggest that it is better done there. Article 81(3) of the Treaty is discussed in Chapter Seven.

The position of the ECJ on these two positions is uncertain. It has not responded to the CFI's *Métropole télévision* judgment. Furthermore, we do not know whether the *Wouters Case* was motivated by the procedural problems discussed in Chapters Two and Three, which no longer exist. A clear decision by the Community Courts to follow Chapter Six's proposals would provide some much needed clarity while giving adequate protection to the importance given to non-economic objectives within the Treaty context. This would benefit undertakings throughout

¹⁰⁹² Mario Monti in Ehlermann (2001), page 9.

the Community and beyond, as long as Chapter Seven's recommendations are also taken into account. If such a judgment were forthcoming then there would be no need for a difficult Treaty change.¹⁰⁹³ Indeed, if the Community Courts clarified this position alone a Treaty change is probably not desirable. This is because the wide notion of a 'restriction of competition' provides flexibility for the future too. However, if the Community Courts are not forthcoming then such a change should be considered.

¹⁰⁹³ See, Baquero Cruz (2002), page 56, discusses the difficulty of changing the Treaty.

CHAPTER SEVEN: HOW AND WHERE *SHOULD* NON-ECONOMIC OBJECTIVES BE CONSIDERED IN ARTICLE 81(3) OF THE TREATY?

1.	Introduction
2.	The First Article 81(3) Test: balancing in the public interest
2.1.	What sort of balancing test is demanded?
2.2.	Which objectives should be considered within the balance?
2.3.	Which markets should be considered when making the assessment?
2.3.1.	<i>Product Market Based Limits to the Analysis</i>
2.3.2.	<i>Geographic Market Based Limits to the Analysis</i>
2.3.3.	<i>Conclusion</i>
2.4.	Are the aims of the parties to the agreement relevant?
2.5.	Conclusion
3.	The Second Article 81(3) Test: consumers must get a fair share of the resulting benefit
4.	The Fourth Article 81(3) Test: do not eliminate competition (Article 81(3)(b))
5.	The Third Article 81(3) Test: indispensability (Article 81(3)(a))
6.	Conclusion

1. INTRODUCTION

If economic efficiency is to be the sole test under article 81(1) of the Treaty, what is left for article 81(3)? Chapters One and Six showed that many other Treaty objectives are naturally promoted as a consequence of furthering welfare. Nevertheless, some objectives cannot be (or are difficult to) pursued through the economic efficiency test. Others can be pursued in part, but not completely. That leaves room for their consideration in article 81(3), via a mere-balancing test.

Chapter Six argued that mere-balancing should only occur within article 81(3) of the Treaty. This repartition better matches article 81's structure. Furthermore, article 81(3)'s framework can be used to limit the use of mere-balancing. The point is not that, in the Community legal order, welfare permanently outweighs all other objectives, Chapter Two. However, the Community has predominantly selected the market mechanism as the basic means of wealth creation.¹⁰⁹⁴ The Commission agrees that Treaty ends should be achieved via the most appropriate means, taking account of the costs of each 'solution'. Article 81(3)'s structure can be used to ensure that this actually happens.

Chapter Seven examines article 81(3) of the Treaty. The Commission is optimistic about legal certainty in article 81 as a whole:

¹⁰⁹⁴ Where this is not the case, Chapter Six allowed the matter to be excluded from article 81(1)'s remit altogether, as happened in the *Albany Case*.

"Undertakings...at present enjoy a satisfactory level of legal certainty thanks to the set of clear rules that have been developed and refined through more than 30 years of Commission decision-making practice and Court of Justice caselaw and by the many different kinds of general instruments that have been adopted..."¹⁰⁹⁵

More cautiously, the Commissioner for DG Competition has said:

"...it is evident, I believe, that the analytical framework for applying article 81(3) has not been explained in any kind of detail. So the purpose really of those Guidelines [Commission, *Article 81(3) Guidelines*] is to remedy this by focusing on article 81(3)." ¹⁰⁹⁶

In clarifying the analytical framework for the application of both article 81(1) and (3) of the Treaty the Commission, *Article 81(3) Guidelines* provide useful guidance to national courts, competition authorities and firms.¹⁰⁹⁷ Nevertheless, we have seen that many non-economic objectives have been (and should be) considered within article 81(3) of the Treaty. Commission, *Article 81(3) Guidelines* do not discuss this at all, except to say:

"Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of article 81(3)..."¹⁰⁹⁸

Even if it is largely accepted that non-economic objectives have a role to play in article 81(3), little else is clear. There is uncertainty, even confusion, as to the proper application of article 81(3) of the Treaty.¹⁰⁹⁹

This problem has been exacerbated, for Member States' courts and competition authorities as well as undertakings themselves, due to the Commission's own ambiguity with respect to the relevance of the non-economic criteria in article 81(3) analysis. Sometimes it has argued that non-economic criteria are relevant. At other times the Commission argues that it cannot apply them, see Chapter Two. Of late, the Commission's notices and proposals include language focusing almost exclusively on the economic content of article 81(3) of the Treaty.

This may lead to less application of the other Treaty objectives in article 81(3) analysis as well as a less Communitaire application of them when they are invoked, undermining the express wording of the Treaty, see Chapter Two. The Commission seeks the consistent application of Community law via a variety of mechanisms in Regulation 1/2003. However, this is unlikely unless the issue of non-economic objectives is directly confronted.

¹⁰⁹⁵ Commission, *White Paper on Modernisation*, paragraph 51.

¹⁰⁹⁶ Monti (2004), page 459.

¹⁰⁹⁷ Lugard and Hancher (2004), page 420.

¹⁰⁹⁸ Commission, *Article 81(3) Guidelines*, paragraph 42. There is also a passing reference to safety and health concerns in paragraph 18(2), but this is equally cryptic and relates to article 81(1) of the Treaty.

¹⁰⁹⁹ van Geerven (2004), page 421; Lugard and Hancher (2004), page 418; Whish (2003), page 154 and Ritter, Braun and Rawlinson (2000), page 118.

Part C as a whole provides a framework for the consideration of non-economic objectives within article 81. Chapters Seven and Eight fill the gaps left by the Commission, *Article 81(3) Guidelines*, in relation to the consideration of non-economic objectives within article 81(3) of the Treaty. This is particularly important in relation to article 81(3) because the decision-maker, traditionally the Commission, has a wide margin of discretion when implementing all four article 81(3) tests.¹¹⁰⁰ Advocate-General Slynn emphasised this:

"...the Commission retains in any event a residual discretion, governed by the objects and policy of the Treaty and by the need to take into account only legally relevant factors, to refuse an exemption. Article 85(3) [now article 81(3)] provides that 'the provisions of paragraph 1 *may*, however, be declared inapplicable', which suggests the existence of a discretion, subject to judicial review by Court."¹¹⁰¹

This is particularly significant in the balancing of non-economic objectives. Furthermore, because the Commission's assessment necessarily involves complex evaluations of economic matters, judicial review by the Community Courts:

"...is necessarily limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers..."¹¹⁰²

Review by the Community Courts includes an assessment of whether the relevant objectives have been considered. It is unlikely to assess what weight these objectives should have been given in the balance, see Section 2, below.

Some suggest that Member States' competition authorities, and particularly their courts, are not appropriate fora for the consideration of public policy of the type we believe the Treaty demands. In this case, either the Treaty must be changed, to make it clear that non-economic objectives are irrelevant within article 81 of the Treaty; or, Regulation 1/2003 should be found *ultra vires*, see the Introduction. Monti, rightly in our view, points to a risk that:¹¹⁰³

"The Commission might end up removing cases from the Member States when matters of public policy are under discussion and grant an exemption on the basis of say employment considerations, which the Member States' authorities may be reluctant to take given the Commission's exhortations that article 81(3) relates only to pure economic considerations...This could lead to the chaotic situation where the Commission grants article 81(3) exemptions according to a different set of standards from Member States!"

¹¹⁰⁰ Goyder (2003), page 120; de Roux and Voillemot (1976), page 95 and Alexander (1973), page 16.

¹¹⁰¹ Joined Cases 25 and 26/84 *Ford-Werke and Ford of Europe v. Commission* [1985], page 2734.

¹¹⁰² Case T-395/94 *Atlantic Container Line v Commission* [2002], paragraph 257. See also, for example, Case T-131/99 *Michael Shaw and Timothy Falla v. Commission* [2002], paragraph 38. It is an open question whether the CFI's greater interventionism in merger control will be reflected in its judicial review of article 81 decisions, see Case T-342/99 *Airtours v. Commission* [2002]; Case T-310/01 *Schneider Electric v. Commission* [2002] and Case T-5/02 *Tetra Laval v. Commission* [2002]. See also Bailey (2004) for a discussion of this point.

¹¹⁰³ Monti (2002), page 1095.

This is a real danger, but for the Commission to act in this way would not be an appropriate solution. Many agreements that fall within article 81(1) of the Treaty already raise non-economic issues. The Introduction showed that the Commission has already considered such issues in a far from negligible proportion of the decisions that it has taken. This proportion is likely to rise, once it becomes clear that non-economic factors are relevant. The best response to this is to make every effort to explain how these considerations can be taken into account. This also fits within the logic of the modernisation proposals, which said that the Commission needed the extra time that decentralisation would allow it to seek out and terminate the particularly pernicious cartels.¹¹⁰⁴

Chapter Seven's analysis comes in four parts, each of which discusses one of article 81(3)'s four cumulative¹¹⁰⁵ tests. Section 2 deals with the first article 81(3) test, involving a public interest balance. Section 3 analyses article 81(3)'s second test, that consumers must get a fair share of the agreement's resulting benefit. The order of the final two provisions has been altered to better reflect the changes that this chapter ultimately suggests. As a result, Section 4 focuses on article 81(3)(b) of the Treaty and Section 5 makes new proposals for article 81(3)(a). Section 6 concludes.

One final issue must be briefly considered before the main analysis starts. The use of the word 'may' in article 81(3) of the Treaty gives the decision-maker a lot of discretion. Some believe that he or she can even introduce new requirements into article 81(3).¹¹⁰⁶ Vedder criticises the suggestion of a fifth article 81(3) test. He asserts that this runs:

"...counter to the clear and...unambiguous wording of article 81(3) which contains only four requirements for an exemption."¹¹⁰⁷

Whatever the reason, a fifth test may be contrary to the CFI's holding in the *Matra Case*:

"...in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in article 85(3) [now article 81(3)] of the Treaty are satisfied and the practice in question has been properly notified to the Commission."¹¹⁰⁸

¹¹⁰⁴ Commission, *White Paper on Modernisation*, paragraph 42.

¹¹⁰⁵ See references to cases in Commission, *Article 81(3) Guidelines*, paragraph 42.

¹¹⁰⁶ See, for example, Jacobs (1993/2), page 58 and Alexander (1973), page 16.

¹¹⁰⁷ Vedder (2003), page 187. Glatz (1985), page 242, agrees.

¹¹⁰⁸ The *Matra Case*, paragraph 85. Wils (2004), page 671, reads the *Matra Case* in this way, for example. Whish (2003), page 150, may obliquely cover the issue too, although this is also unclear. "An agreement must satisfy four conditions if it is to benefit from article 81(3)."

Although admittedly, it is unclear whether this paragraph covers this issue, because the CFI was pronouncing on a somewhat different point. Nevertheless, Commission, *Article 81(3) Guidelines* take a decisive stand on this point:

"The four conditions of article 81(3) are...exhaustive. When they are met the exception is applicable and may not be made dependant on any other condition."¹¹⁰⁹

It is unlikely that Member States' courts and competition authorities would ignore such a clear statement. In any event, in our view a fifth condition is unnecessary because public policy can be adequately considered within article 81(3) as it is currently interpreted. Addition of a new condition would merely add confusion as to its limits. It would also set a difficult precedent for Treaty interpretation in other areas.

2. THE FIRST ARTICLE 81(3) TEST: BALANCING IN THE PUBLIC INTEREST

Article 81(3)'s first condition says that article 81(1) of the Treaty may be declared inapplicable for agreements which contribute:

"...to improving the production or distribution of goods or to improving technical or economic progress..."

What objectives can be considered here? The Commission argued for a consumer welfare test in its policy statements, Chapter Two. Chapters Two and Four showed that article 81(3)'s first test's wording has been interpreted widely. Many objectives have been considered there. Indeed, the CFI has held that:

"...in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under article 85(3) [now article 81(3)] of the Treaty."¹¹¹⁰

Many Commission decisions, as well as Community Court judgments, show that the application of article 81(3) is "...not pure law or economics, but policy."¹¹¹¹ We have seen that the decision-maker has a lot of discretion in the application of article 81(3) of the Treaty. Having said that, it is important that this discretion, combined with the potentially wide remit of article 81(3)'s first test, does not mean that there is no control:

¹¹⁰⁹ Commission, *Article 81(3) Guidelines*, paragraph 42.

¹¹¹⁰ Joined Cases T-528/93, etc., *Métropole Télévision v. Commission* [1996], paragraph 118. See Chapter Two for other references.

¹¹¹¹ Sauter (1997), page 114. See also, B&C (2001), paragraph 3-019; Wesseling (2000), pages 20, 39, 109-111; Whish (1998), page 500; Amato (1997), pages 121 and 122; McGowan and Wilks (1995), pages 148 and 149; de Jong (1990) and Verstrynge (1988), page 4. This is also the implication of Commission, *Co-operation Guidelines - NCAs*, paragraph 43, "...the Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing *policy* and safeguarding consistency when it comes to the application of EC competition law. [my emphasis]" and Commission, *Handling of Complaints Guidelines*, paragraph 8. For a contrary view see Wils (2004), pages 671, 672, 694 and 718 and Wils (2002), page 123.

"The importance of the competition rules in the overall scheme of the EC Treaty means that this authority to grant exemptions is not a matter within the Commission's [or now (presumably) that of the Member States' courts and competition authorities] free discretion but must be exercised in accordance with legal standards."¹¹¹²

Many objectives are, and should be, considered within article 81(3)'s first test and this should continue to be the case. But, the decision-maker (and particularly the Commission which has a lot of influence here) must correctly explain which objectives (and effects) should be taken into account there, as well as the content and weight of these aims.¹¹¹³ This is important in relation to article 81(3), because, under Regulation 1/2003, Member States' courts and competition authorities are now applying it for the first time. It has particularly important implications for article 81(3)'s first test, which forms the basis for the article 81(3) assessment.

Section 2 examines four issues that are relevant in the balancing process under the first condition of article 81(3) of the Treaty. Section 2.1. asks what sort of balancing test is demanded. Then Section 2.2. discusses which objectives can and should be considered within the balance. Section 2.3. investigates which markets should be considered when making the assessment; and then we ask whether the aims of the parties to the agreement are relevant, Section 2.4. Section 2.5. concludes. In addition, the rest of Chapter Seven discusses certain limits to this test and Chapter Eight provides guidance on how to inject more clarity and predictability into the balancing *process*.

2.1 What sort of balancing test is demanded?

Chapter Two showed that, in the Commission's view, article 81(3) of the Treaty expressly acknowledges that restrictive agreements may generate objective benefits¹¹¹⁴ which outweigh the negative benefits of the restriction of competition, under article 81(1). We call this the 'optimal balance' or public interest. The optimal balance is currently assessed on an ad hoc way. Little or no effort is currently made to make a comprehensive assessment of the agreement's

¹¹¹² Ritter, Braun and Rawlinson (2000), page 114.

¹¹¹³ Areeda and Hovenkamp (2000), page 97.

¹¹¹⁴ These are not just improvements to the parties. This has been clear since *Consten and Grundig Case*, where the ECJ held, paragraph 13 of the case summary "The improvement in the production and distribution of goods, which is required for the grant of exemption cannot be identified with all the advantages which the parties to the agreement obtain from it in their production or distribution activities, since the content of the concept of improvement is not required to depend upon the special features of the contractual relationships in question. This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition." See also, Commission decision, *Quantel International-Continuum/ Quantel*, paragraph 52. Commission, *Article 81(3) Guidelines*, paragraph 49, explains that this means that one should not look at the subjective benefits to the parties. Nor need they be benefits to consumers, Commission, *Article 81(3) Guidelines*, paragraph 46, distinguishes between objective and consumer benefits. This makes sense because otherwise article 81(3)'s second test would be superfluous. In essence, what is important is that the agreement produces a positive effect on the market generally, Case T-131/99 *Michael Shaw and Timothy Falla v. Commission* [2002], paragraph 163.

wider effects. Where this is done, often only one or two objectives are examined. The whole exercise must be placed on a more formal footing, Section 2 and Chapter Eight aim to do just that.

From what we have seen, *advantages* due to benefits from non-economic objectives, such as environmental protection, would count in this regard.¹¹¹⁵ Furthermore, these objective benefits can also be combined. In Commission decision, *Ford/ Volkswagen*, the Commission took account of industrial policy, employment, environmental and economic and social cohesion arguments¹¹¹⁶ when considering the benefits that would likely accrue as a result of the agreement.¹¹¹⁷ Chapter Eight provides a framework within which various objectives can be combined.

Chapter Six said that agreements that cause no competition problems, but cause environmental damage, for example, should be dealt with through environmental legislation and not competition law. This comment does not necessarily apply to the use of article 81(3) of the Treaty for the consideration of non-economic objectives.¹¹¹⁸ In part this is because a competition problem exists, otherwise article 81(3) would not be relevant. To extend the *détournement de pouvoir* argument beyond this would involve ignoring the Treaty's structure, as interpreted by the Community Courts. It would also overlook the express wording of the policy-linking clauses, which demand the consideration of many non-economic policies within, amongst others, article 81, see Chapter Two.

Should *disadvantages*, due to the way in which the agreement undermines non-economic objectives, such as environmental protection and culture, also be considered? In other words, imagine an agreement that restricts competition, but contributes to economic and social cohesion within the Community. Can the fact that the same agreement also prejudices environmental protection (i.e. causes negative effects) be taken into account in the balance too?

The language of article 81(3)'s first test only refers to 'improvements'. This could be read as excluding the consideration of negative factors. That need not be the case, if we read it as meaning 'overall improvements' once the agreement's advantages and disadvantages have been taken together as a whole.

¹¹¹⁵ See, Chapters Two and Four; Monti (2002) and Bouterse (1994), pages 26-28 and 126-129.

¹¹¹⁶ Although this is open to debate, see Chapter Four.

¹¹¹⁷ Many other examples exist, see Chapter Four, particularly the background to the consideration of environmental issues within article 81(3) of the Treaty and Vedder (2003), pages 162-164.

¹¹¹⁸ Vedder (2003), pages 76-78 and 169, agrees. This seems to have been accepted by the President of the Bundeskartellamt, see Wolf (1998), page 481.

The Community Courts' and Commission's insistence that article 81 should be interpreted in light of the Treaty structure as a whole does not distinguish between positive and negative effects.¹¹¹⁹ Considerable prejudice could be done to the pursuit of other objectives if negative effects must be ignored. Not only would this give a partial balance; but also some of the policy-linking clauses may demand the consideration of negative effects. Article 6, for example, says that:

"Environmental protection requirements must be integrated into the definition and implementation of the Community policies [including competition policy]...in particular with a view to promoting sustainable development."

This provision does not distinguish between the positive and negative effects on the environment. Nevertheless, its structure implies that negative effects are important.¹¹²⁰ Furthermore, provisions such as article 174(2) of the Treaty, establishing the polluter pays principle in environmental policy, would be undermined if the parties to an agreement could profit without regard to any environmental harm that they might cause.

This proposition has also received academic support. Jacobs argues that there must be a conscious decision that "...the benefits of the measure in question are able to outweigh the harm to the environment."¹¹²¹ Jans agrees:

"The Commission ought to take account of the environmental effects of an exemption...However, this does not mean that the Commission would be wholly unable to grant an exemption if this were to imply significant environmental effects. These effects should be taken into account and carefully balanced against the other interests involved."¹¹²²

Finally, Chapter Four pointed to two objectives, market integration and consumer protection, which the Commission has already given such 'negative weight' in the balance.

¹¹¹⁹ In Case 14/68 *Walt Wilhelm v. Bundeskartellamt* [1969], the ECJ held, paragraph 5, "While the Treaty's primary object is to eliminate by this means [article 81] the obstacles to the free movement of goods within the Common Market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with article 2 of the Treaty." In Commission, *RCP 1997*, Commissioner van Miert said, page 10 "...competition policy can be expected to play a federating role in the years ahead. To the extent that...the policy can contribute to the successful attainment of the Union's principal objectives, I believe it is our duty to act in a spirit of even closer cooperation with other Community policies. The coordination of the Commission's various areas of activity is already highly developed, but it must do more than just ensure a necessary degree of administrative efficiency, being given instead the force of a political principle."

¹¹²⁰ A similar position arises in the other policy linking clauses, see article 127(2), 153(2), 159 and 178 of the Treaty. Arguably, some of these clauses are even clearer. For example, article 151(4) says that cultural policy must be taken into account "...in particular in order to respect and to promote the diversity of its cultures. [my emphasis]" Article 152(1) says that Community policy in the area of health will be directed towards "...improving public health...and obviating sources of danger to human health."

¹¹²¹ Jacobs (1993/2), page 58. Admittedly, Jacobs believes that this requires the insertion of a fifth article 81(3) condition, whereas we suggest weighing the requirement within article 81(3)'s first test. We discussed this above.

The consideration of both positive and negative effects in article 81(3)'s first condition would considerably increase the costs and complexity of the balancing exercise. There is no direct evidence of support from the Community Courts for this position either. For example, in paragraph 118 of *Métropole Télévision* case, cited above, the CFI said that the Commission was entitled to base itself on considerations connected with the pursuit of the public interest *in order to grant* exemption under article 81(3) of the Treaty. It does not say the Commission can base itself on public interest considerations to *exclude* exemption. This might be read as only applying to the positive consideration of such objectives.¹¹²³ One might also resurrect the point that, where negative non-economic policy considerations can be raised, article 81 risks becoming a, for example, environmental policy instrument.

In our view, article 81(3)'s first condition, when considered in its overall Treaty context, demands that both the positive and negative weights of the relevant policy objectives be considered there.¹¹²⁴ To ignore them would not make sense.¹¹²⁵ True, a full balancing process complicates the decision-making exercise under article 81(3) of the Treaty, as well as its predictability for undertakings. These problems can be reduced through use of a more predictable balancing *process*. Chapter Eight provides a framework for this. Furthermore, while the Community Courts have not expressly ruled on the point, they have not ruled against it either. In fact, their judgments emphasise that article 81(3) requires a complex balancing exercise. We have seen the Commission include negative weight in the balance. There is some risk of *détournement de pouvoir*, however, a competition problem will now, by definition, have arisen and so the problems are diminished. This is especially so because the Treaty's structure tends to support a full balancing exercise.¹¹²⁶

2.2 Which objectives should be considered within the balance?

Many objectives have been considered within article 81(3) of the Treaty, see Chapter Two. This is not a closed list and we do not seek to define them here. Section 2.2. considers whether the article 81(3) exemption should cover national, or only Community, issues. In our view, national

¹¹²² Jans (2000), page 277. See also Vedder (2003), pages 186 and 187.

¹¹²³ Also, the Commission does not consider the possibility of negative weight in Commission, *Horizontal Guidelines*, when discussing environmental protection, for example.

¹¹²⁴ Does Whish (2003), page 151, imply the same, in passing "Any advantages claimed of the agreement must outweigh the detriment it might produce..."? This seems unlikely, as he is considering the article 81(1) restriction.

¹¹²⁵ The Commission has insisted on the assessment of "...all relevant positive and negative impacts..." in impact analysis. See, for example, COM(2002) 276, page 15.

¹¹²⁶ However, a decision which balances positive and negative factors in this way must not pretend to set down a *general rule*, for example that no agreement can be exempted that does not contribute X amount to the environment. That said, article 81(3) decisions would not contravene the Treaty's constitutional framework where it is clear that they merely seek to balance the requisite factors *in the case at hand*, Vedder (2003), pages 187 and 188.

interests are relevant there. We discuss where they should be considered and who should decide how much weight they should be given.

First, let's define the issue more concretely. For the most part, we have discussed what are known as horizontal conflicts. That is, conflicts between different objectives of an equal level, such as conflicts between Treaty provisions, created by the policy-linking clauses. The issue considered in this part is different. It discusses conflicts between Community law and national policies. What we are referring to here are not mere vertical conflicts, where Community law would prevail.¹¹²⁷ Instead, at issue are conflicts between Community law in one area of competence, in this case article 81, and agreements which reflect national law/ policy in a different area of competence, where the Member States have exclusive competence, or there is a parallel or shared competence not yet occupied by the Community (diagonal conflicts).¹¹²⁸

Diagonal conflicts are often politically sensitive. It may well be that objectives that Member States hold dear are at stake. It is untenable not to consider certain policy rationales for the sole reason that they do not fall within Community competence,¹¹²⁹ or are not mentioned in the Treaty. This would promote Community interests to the exclusion of those of the Member States,¹¹³⁰ which would be unacceptable.

"...the Court has always had to strike a balance between the protection of the legitimate prerogatives of the Member States and those of the Community..."¹¹³¹

Nevertheless, Monti argues that national interests cannot justify an exemption under article 81(3) of the Treaty.¹¹³²

"...where a Member State has the right to request that national interests justify the non-application of the full force of EC law, the Treaty has made *express provision* (e.g. articles 30 and 86(2) EC) and the range of domestic policy considerations are fully

¹¹²⁷ See, Craig and de Búrca (1998), Chapter 6.

¹¹²⁸ See, Deckert (2000), pages 181 and 182.

¹¹²⁹ Schmid (2000), page 163.

¹¹³⁰ The *European Convention* may, if adopted, change this position. Article I-6 reads "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." This could be interpreted as relating to vertical conflicts, i.e. as a codification of the current law. See, for example, House of Lords Select Committee on the European Union, *The Future of Europe* (2002/3), page 16. However, the provision is wide enough to include diagonal conflicts too. If the Community Courts read it expansively, then Member State interests will no longer be relevant where they conflict with the normal scope of article 81. See also Dashwood (2002), pages 416 and 417.

¹¹³¹ Rodríguez Iglesias and Baquero Cruz (2003), page 74. See also, Boch (2003), page 47. Article F.1. of the Maastricht Treaty expressly guarantees that the Union shall "...respect the national identities of its Member States..." See also Handoll (1994), page 234.

¹¹³² Monti (2002), page 1083. See also Evans (1985), page 101, "...the first condition for exemption requires the Commission to determine whether the agreement or practice contributes to attainment of objectives in the Community interest."

circumscribed¹¹³³...Thus, it is submitted that absent an express *renvoi* embedded in the article 81, national interests cannot be taken into consideration when exempting an agreement under article 81(3).¹¹³⁴

Monti's argument can be broken down into two steps. First, he says that if a Member State wishes to justify the non-application of Community law because of national interests it must find an express right in the Treaty. Examples of such a right are articles 30 and 86(2) of the Treaty. Secondly, he adds, that the range of domestic policy considerations that can be considered for exemption are fully set out in those exemption provisions. No others can be considered. He concludes that unless article 81 contains an express *renvoi* to national interests, which it does not, then they cannot be considered under article 81(3) of the Treaty.

We consider these points in turn. First, it is unclear what Monti means by "...the Treaty has made express provision..." where national interests justify the non-application of the full force of Community law. He refers to two Treaty provisions to support him, articles 30 and 86(2). Both provide defences based on national interests;¹¹³⁵ although, neither expressly refers to *national* interests. Nor do other exemption provisions that deal with national interests, such as article 39(4) of the Treaty, make specific reference to this fact.¹¹³⁶ The ECJ seems prepared to imply the fact that, for example, the public security exemption refers to national public security.

Is Monti's point that one can only have a defence if there is a specific exemption provision? Perhaps, but then article 81(3) of the Treaty provides an explicit example of an exemption provision. Why couldn't the Community Courts assume that this provision could apply to national interests where this were relevant? They have already interpreted it widely in relation to other Community interests. So Monti's first point does not seem to be fulfilled in relation to article 81 and the consideration of national interests by way of defence.

¹¹³³ Weatherill and Beaumont, *EU Law*, 2nd ed. (Penguin, 1999), Ch. 16.

¹¹³⁴ "Two Advocates General have supported the use of Art. 81(3) to safeguard national interests (A.G. Jacobs in Case C-67/96, *Albany International*, [1999] ECR I-5751 para 193, and Cases C-180/98 to C-184/98, *Pavlov*, [2000] ECR I-6451 para 90; and A.G. Léger in *Wouters*...). However, their reasoning relies on the case law mentioned in sections 2 to 4 of this paper, which it is submitted is insufficiently compelling to support their argument. The case which most closely justifies this position is Case C-360/92 P, *Publishers' Association v. Commission*, [1995] ECR I-23 where the ECJ requested that the Commission take note of the policy reasons advanced by the English courts to allow resale price maintenance, and this might offer some indirect support for using national interests to justify a restriction of competition, but the ECJ did not address this point fully. Cf. A.G. Lenz's discussion in this case, at para 33."

¹¹³⁵ In relation to article 30, Case 34/79, *Regina v. Henn and Darby* [1979], paragraph 15, where the ECJ said, "In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its own territory." In relation to article 86(2) of the Treaty see, Case C-202/88 *France v. Commission* [1991], paragraph 12; Case C-157/94 *Commission v. Netherlands* [1997], paragraph 39 and Commission Communication, *Services of General Interest*, paragraph 22.

¹¹³⁶ For examples of cases where the national interest was considered under article 39(4) of the Treaty, see Case 152/73 *Spigiu v. Deutsche Bundespost* [1974]; Case 149/79 *Commission v. Belgium* [1980]; Case 307/84 *Commission v. France* [1986] and Case C-4/91 *Annegret Bleis v. Ministère de l'Éducation Nationale* [1991].

In the second step of Monti's argument, he says that where defences have been granted in the Treaty they provide a closed exemption list. This position is supported in the caselaw related to the four freedoms.¹¹³⁷ In one case the ECJ said:¹¹³⁸

"Since it derogates from a fundamental rule of the Treaty, article 36 [now article 30] must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein. Neither the safeguarding of consumers' interests nor the protection of creativity and cultural diversity in the realm of publishing is mentioned in article 36."

However, Chapter Two demonstrated that the Community Courts have interpreted the heads of exemption in article 81(3)'s first test widely. They have done this in a way that would have been inconceivable under article 30 of the Treaty. As Monti points out,¹¹³⁹ the Commission is now entitled to base itself on considerations connected with the pursuit of the public interest in order to grant an exemption under article 81(3) of the Treaty.

Furthermore, the ECJ restricts the interpretation of, for example, article 30, in terms of the heads of exemption that can be raised under it. New heads of claim, such as consumer protection and fairness of commercial transactions¹¹⁴⁰ and economic policy cannot be added.¹¹⁴¹ But, the ECJ is *not* restricting the interpretation of these heads in terms of the *source* of the interest, be it national or Community. They have not restrictively interpreted an exemption in order to find that only Community and not national public policy could be invoked, for example.

From what we have seen above, Monti's second step does not relate to the point about whether or not national issues can be considered within article 81(3) of the Treaty. This is either because:

- unlike other Treaty exemptions, article 81(3)'s heads of exemption have been interpreted widely; or, alternatively,
- restrictive interpretation of Treaty exemptions does not imply accepting Community-based public policy but rejecting that of the Member States.

One might stop the analysis there. Monti's concluding remark, that absent an express *renvoi* embedded in the article 81, national interests cannot be taken into consideration when

¹¹³⁷ A possible exception may be Case C-2/90 *Commission v. Belgium* [1992], but it is likely that the ECJ saw this as a mandatory requirement as opposed to an article 30 exemption, see, Craig and de Búrca (1998), page 604. Also see, Mortelmans (2001), page 636, footnotes 118 and 119.

¹¹³⁸ The *Leclerc Case*, paragraph 30. See also, Case 113/80 *Commission v. Ireland* [1981], paragraph 7. However, Oliver (2003), page 217, has suggested that article 28's mandatory requirements be subsumed within article 30.

¹¹³⁹ Monti (2002), page 1057.

¹¹⁴⁰ Case 220/81 *Criminal proceedings against Timothy Robertson* [1982], paragraph 8.

¹¹⁴¹ Case 72/83 *Campus Oil v. Minister for Industry* [1984], paragraphs 34 and 35.

exempting an agreement under article 81(3), does not seem to be supported by his first two propositions.

But it is interesting to ask why there might be a difference between the article 81 approach and that of the free movement provisions. One possible answer is that, in article 81, the first and third paragraphs normally involve balancing two sets of *Community* interests. For this reason there is no need to interpret article 81(3) so restrictively. This is not the case in relation to articles 30, 39(3) and (4), 45-48 and 55 of the Treaty. These provisions, as interpreted by the Community Courts, all allow for the derogation of a Treaty objective because of national interests.¹¹⁴² It is not surprising, politically, that in a clash between Member States' and the Community's interests, the Community Courts seek to interpret these exceptions narrowly.

This might support Monti's proposition. If he is right in saying that certain objectives, such as culture, are exclusively national in scope, perhaps they should be dealt with differently (or not at all) under article 81(3)? Perhaps the more restrictive approach that we see to exemptions in, for example, articles 28 and 30, should also apply here, as opposed to the expansive reading of the heads of exemption in article 81(3) of the Treaty?

The Commission's decisions and the Community Courts' judgments do not support this thesis. Chapter Four suggested that Commission decisions, such as *Jahrhundertvertrag* and *VIK-GVSt*, seem to have been decided purely on the basis of national security issues.¹¹⁴³ The Commission has, as Monti points out,¹¹⁴⁴ regularly considered culture under article 81(3) of the Treaty, Chapter Four.¹¹⁴⁵ The Council also thinks that it should be considered there.¹¹⁴⁶ Furthermore, in *Métropole Télévision*¹¹⁴⁷ the CFI considered a Commission exemption decision. The CFI found that the article 86(2) concept of a public mission was a fundamental component of the Commission's decision, paragraph 115. Although it held that this had been done improperly in this case, the CFI famously continued, paragraph 118:

"...in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under article 85(3) [now article 81(3)] of the Treaty."

¹¹⁴² Evans (1985), pages 100 and 101 and Evans (1983), pages 593-599, also make this point.

¹¹⁴³ There are other examples too, see, Commission decisions, *United Reprocessors* and *Scottish Nuclear, Nuclear Energy Agreement*, paragraphs 3-12 and 33-36.

¹¹⁴⁴ Monti (2002), page 1084. Goyder (2003), page 94, says that if the agreement had been notified, the Member State's interests in the *Wouters Case* would have been considered under article 81(3) of the Treaty.

¹¹⁴⁵ Schmid (2000), page 168, says that the decision-maker is bound to do so because of article 151(4) of the Treaty.

¹¹⁴⁶ Mortelmans (2001), footnote 138, argues that public health is also a national interest. Public health has been considered within article 81(3) of the Treaty too, for example, Commission decision, *Pasteur Mérieux-Merck*.

¹¹⁴⁷ Joined Cases T-528/93, etc. *Métropole Télévision v. Commission* [1996]. Chapter Two discusses the facts of the case.

Despite article 16 of the Treaty, it is clear that the public interest criterion under article 86(2) of the Treaty is made up of national and not Community interests, see above. This implies that the CFI was prepared to allow national interests to be considered in an exemption decision. This tends to support the view that these issues can be balanced under article 81(3).¹¹⁴⁸

There may be a limit as to which Member State objectives can be raised here. They may need to be justified in accordance with the Treaty's article 2 principles, or even those in the Preamble. Back in 1965, the ECJ held that:

"While the Treaty's primary object is to eliminate by this means [either use of article 81(1) or through the application of article 81(3)'s first provision] the obstacles to the free movement of goods within the Common Market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with article 2 of the Treaty."¹¹⁴⁹

Today, article 81 probably better reflects the current Treaty balance than the Community Courts' interpretation of articles 28 and 30. They still give precedence to the needs of the Common Market over objectives such as environmental and consumer protection. But as Demetriou and Higgins write:

"...while this precedence was justified under the original Treaty of Rome, subsequent amendments to that Treaty have ostensibly changed the relationship between the fundamental policies and other policies. In particular, the Treaty of Maastricht appears to have abolished any precedence between the various Community policies. Thus the Treaty is no longer built around the four fundamental freedoms. Instead, the Treaty contains a number of non-hierarchical 'Community policies'"¹¹⁵⁰

We have seen that Member States' interests *can* be considered under article 81(3) of the Treaty (although probably within the article 2 limits). But is this the best place to consider them? Monti, relying on his conclusion that national issues could not be considered within article 81(3) suggests the use of a rule of reason mechanism, providing *Wouters* as an example of the Community Courts' reasoning in this area.¹¹⁵¹ Chapter Two showed that the European Parliament and the Council also believe that certain Member States' objectives (there it was culture) should be considered within article 81(3) of the Treaty. Chapter Six explained why mere-balancing within article 81(1) is inadvisable and why it is better done under article 81(3)

¹¹⁴⁸ Monti also refers to Case C-360/92P, *Publishers' Association v. Commission* [1995], where the ECJ told the Commission to take note of the policy reasons advanced by the English courts to allow resale price maintenance. This might offer some indirect support for using national interests to justify a restriction of competition, pages 60 and 61 and paragraph 32 and 40-44, although, as Monti points out, the ECJ did not address this point fully, see reference above.

¹¹⁴⁹ Case 14/68 *Walt Wilhelm and Others v. Bundeskartellamt* [1969], paragraph 5.

¹¹⁵⁰ Demetriou and Higgins (2003), page 193.

¹¹⁵¹ Monti (2002), pages 1086-1088.

of the Treaty. There is an additional reason why Chapter Six's conclusion is even more appropriate for Member States' interests, from a Community perspective. That is because only considering restrictions of competition and Member States' interests under article 81(1) of the Treaty could have a negative effect on other Community policies.¹¹⁵² Imagine an agreement that restricted competition, undermined environmental policy and yet improved cultural awareness within the meaning of article 151 of the Treaty. All of these objectives could be balanced under article 81(3) of the Treaty to establish the optimal outcome, see Section 2.1. However, under Monti's system, the environmental protection problems are irrelevant and cannot be considered. This moves the pendulum too far in favour of Member States' interests at the expense of important Community policies, ignoring the Treaty's structure.¹¹⁵³

One final objection can be raised to Monti's suggestion. It divides public policy into two categories, that of the Member States and that of the Community. But is this right? Surely the Treaty was signed in order to achieve Member States policy goals in the long term? Even if one could distinguish between Member States and Community objectives in the short term, how do we distinguish between them? Monti appears to assume that there are only two categories of competence, those where Member States have exclusive competence, and those where the Community has exclusive competence. However, there are many areas of mixed competence.¹¹⁵⁴ Policy objectives in areas of mixed competence may be hard to define as either Member State or Community aims. So, where would these issues be balanced, under article 81(1) or (3) of the Treaty? How would we decide this? Would it depend upon who raised the issue, for example; or on whether the Community had acted? This problem could become contentious. Yet, dispute is unnecessary under the Treaty. Better, surely, to consider all objectives in one place and eliminate this controversy altogether?

So, the Member States' objectives should be considered under article 81(3) of the Treaty. But, where they conflict with other objectives within article 81, who should decide where the balance lies between the Community interest(s) and the Member State interest(s)? Two cases should be considered. First, where the weight to be given to a particular objective is specifically defined in

¹¹⁵² Monti (2002), pages 1085 and 1086, also points out, rightly in my view, that using mechanisms such as denying an effect on trade between Member States for some net book agreements is unsatisfactory, see also Chapter Two.

¹¹⁵³ This conclusion is not altered by Regulation 1/2003, recital 9 and article 3(3): "*Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not...preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by articles 81 and 82 of the Treaty. [my emphasis]*" This is secondary legislation and is expressly without prejudice to other provisions of Community law. In any event it is intended to cover a different situation, see, for example Kingston (2001), page 342 and Wesseling (1999), pages 429 and 430.

¹¹⁵⁴ See, Craig and de Búrca (1998), page 117, where, in relation to external powers, for example, they say "For the most part, the external powers of the Community are shared with the Member States, rather than being exclusive..." The European Convention lists many more areas of shared competence, see article I-14, than those of exclusive competence, see article I-13.

the Treaty. Secondly, what happens where the Treaty does not define the weight to be assigned to the objective? This last point can be split into two parts, depending upon whether or not the relevant Member State clarifies what weight it believes should be assigned to the objective in question.

Where the appropriate weight to be assigned to the objective is already established in the Treaty, the position is relatively straightforward. Take the example of public health. This is an area in which, within the limits set by Community law, the Member States retain full competence.¹¹⁵⁵ Article 152(1) is the relevant clause for public health. This demands that:

"A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities."

Chapter Two explained why the Commission must consider public health issues in its article 81(3) analysis. When performing the article 81(3) balance, the decision-maker is also bound to give public health the weight ascribed to it in the Treaty, in this case, a high level of protection is demanded, see Chapter Eight.¹¹⁵⁶ Once the weight for all relevant objectives has been established, the decision-maker must combine them to decide the case.

But what if the Treaty does not define the weight to be assigned to the objective? This is common. Consider national policies such as the security of the energy supply. Their weight is not defined in the Treaty. There may be a diagonal clash between this objective and competition, see Chapter Four.

The relevant decision-maker should be extremely sensitive to the Member States' arguments here. There are two problems. How can the decision-maker know what weight the Member States give these objectives; and, who should have the final say about this weight, the Member States or the specific decision-maker seized of the relevant case?

It should often be possible for the decision-maker to establish what the Member State concerned thinks the balance should be. This is because the Member State can intervene directly in the matter and articulate the balance that they think is appropriate. Where the relevant Member State decides not to intervene, the decision-maker has a problem. It must weigh the Community against the Member State's interests, but it does not know the importance given to this issue by the Member State. In such a case it would be appropriate to invite the Member State to intervene. If they do not, then the decision-maker should have full discretion as to what weight the national interest is given in the balance.¹¹⁵⁷

¹¹⁵⁵ Mortelmans (2001), section 6.1.2.3.

¹¹⁵⁶ Although there are still quantitative issues to be resolved even here, see Chapter Eight.

¹¹⁵⁷ Gilliams (2005) DRAFT, page 27, explains the *Wouters Case* in the same way.

It would be politically desirable, on legitimacy grounds, that the competent national and Community authorities should come to an agreement about the balance by weighing these two goals. For this there must be political and administrative co-ordination and negotiation.¹¹⁵⁸

Should the decision-maker be bound by the Member States' balance? The answer is a muted yes, although the Community Courts have the ultimate say here.¹¹⁵⁹ This is similar to the issues raised in the article 28/ 30 balance. The ECJ discussed this point in cases such as *Henn and Darby*.¹¹⁶⁰ There, two UK statutes forbade the importation of some types of pornography, which it held to be obscene. The ECJ said, paragraph 15:

"In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its own territory."

This shifts the weight very much in favour of Member States' interests.¹¹⁶¹ In the absence of harmonised rules at the Community level,¹¹⁶² recourse to article 30 can entail the application of different standards in different Member States, as a result of different national judgments, and different factual circumstances.¹¹⁶³

Nevertheless, the Community Courts do not completely relinquish control and insist on having the final say on where the balance lies in the free movement of goods provisions. In *Campus Oil*,¹¹⁶⁴ the ECJ held that the purpose of article 30:

"...is not to reserve certain matters to the exclusive jurisdiction of the Member States; it merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the article."

Ultimately, it is for the Community Courts to decide whether or not derogation is justified.¹¹⁶⁵

¹¹⁵⁸ Schmid (2000), page 161 and Deckert (2000), page 181. Co-ordination is still possible post Regulation 1/2003. The Commission can take article 81 decisions still, preventing the Member States' authorities from acting, see above. Where this happens, Member States are still consulted through the Advisory Committee, Commission, *Co-operation Guidelines - NCAs*, section 4.1.1. Even where a Member State's competition authority retains control of a matter, the Commission, as well as other Member States, can discuss the case with them, Commission, *Co-operation Guidelines - NCAs*, section 4.1.2. See also Monti (2004), pages 408-410.

¹¹⁵⁹ Rodríguez Iglesias and Baquero Cruz (2003), page 73, write that the ECJ is "...the final arbiter of the division of powers between the Community and the Member States." See also, Handoll (1994), page 240.

¹¹⁶⁰ Case 34/79 *Regina v. Henn and Darby* [1979].

¹¹⁶¹ Schmid (2000), page 164.

¹¹⁶² Case 72/83 *Campus Oil Limited v. Minister for Industry and Energy* [1984], paragraph 27.

¹¹⁶³ See, for example, Wyatt and Dashwood (1993), pages 225 and 226. See also, Case 94/83, *Albert Heijn* [1984], paragraph 16.

¹¹⁶⁴ Case 72/83 *Campus Oil v. Minister for Industry* [1984], paragraph 32.

¹¹⁶⁵ See also, Case 121/85 *Conegate Ltd. v. Commissioners of Customs and Excise* [1986], paragraphs 15-17; Mortelmans (2001), pages 622, 635 and 637 and O'Loughlin (2003), pages 62-69.

In the *Wouters Case*, Member State and Community interests were balanced under article 81(1) of the Treaty. Chapter Three noted that, in that case, the ECJ readily accepted the national assessment of the appropriate balance between competition and the Member State interest.¹¹⁶⁶ It also accepted that some Member States could legitimately have stricter rules than others.¹¹⁶⁷ Nevertheless, the ECJ seems to reserve the right to hold that the balance has gone too far through its use of the proportionality test. True, the Community Courts have been more reluctant to interfere in the article 81(3) balance. Nevertheless, while they would leave a large discretion to the decision-maker, they would probably intervene where important Community and Member States interests conflicted within article 81(3) of the Treaty, if they thought the balance that had been established was clearly wrong.

The Member States may be unhappy about such interference, but they can always create new policy-linking clauses (and specific expressions of an objective's weight) in the next Treaty amendment, to the extent that they think that the Commission did not strike the right balance. These clauses are desirable as they improve clarity.

Note that, in relation to balancing under article 81(3), the decision of one Member State may affect other Member States. This is because article 81 only applies where trade between Member States is appreciably affected. This may undermine the balance that the second state seeks to strike in this area as well as restricting the Member States' ability to achieve the goals they seek.¹¹⁶⁸ Having said that, the same can be said of article 28, which only applies to quantitative restrictions on imports between Member States. Where such a clash takes place, it is for the decision-maker to try to take account of these 'externalities' in its decision.¹¹⁶⁹

Commission decision, *Ford/ Volkswagen*, may be an example of this. The parties' joint venture was supposed to create about 15,000 jobs in one of the Community's poorest regions, paragraph 36. In the appeal to the CFI, the applicant argued that, paragraph 89:

"...the project coincides with the closure of several industrial sites in Europe and merely amounts to a transfer of employment from areas where unemployment is high and labour is costly to an area where there is less unemployment and labour is cheaper, so that the joint

¹¹⁶⁶ Forrester (2005) DRAFT, page 8 and Siragusa (2005) DRAFT, page 3. By this I mean the prevailing perception in the Netherlands with respect to the legal profession, Gilliams (2005) DRAFT, page 27.

¹¹⁶⁷ Discussed in Forrester (2005) DRAFT, page 8. Wesseling (1998), page 485, refers to the subsidiarity principle in relation to this too, article 5 of the Treaty.

¹¹⁶⁸ Gual (1995), page 41.

¹¹⁶⁹ I do not mean by this that one should look to the interest of the Community as a whole, as is done in the implementation of article 87(3) of the Treaty, see Case 730/79 *Philip Morris v. Commission* [1980], paragraphs 24-26; Case C-301/87 *France v. Commission* [1990], paragraphs 49-51 and Case C-278/95P, *Siemens v. Commission* [1997], paragraph 35. It is individual Member State's interests that are important. However, where these undermine other Member States' interests, these must this be taken into account in the balance.

venture cannot be regarded as contributing to the "economic and social cohesion" of the Community."

The Commission was bound, if it took account of employment considerations in the decision (see Chapter Two), to balance the interests of two Member States (Germany and Portugal) when applying article 81(3) of the Treaty.¹¹⁷⁰

In conclusion, in cases of diagonal conflict, the Member States' interests, where ascertainable, cannot just be ignored. It is preferable to take account of them in article 81(3) of the Treaty. There is precedent for doing so.¹¹⁷¹

The easiest case is where there are policy-linking clauses and the Treaty expressly assigns the weight that certain objectives must be given. The additional clarity provided by such clauses means that, where possible, more should be provided for in other areas of Member State interest. The context can change the weight; here the decision-maker should pay particular attention to the arguments of the Member States. Even where there are no such clauses, the Member States' balance should be followed if this is ascertainable. However, the benefits to one Member State must not unduly affect another Member State. Where this is the case the decision-maker must take the interests of the others into account in its balancing.¹¹⁷² Where a Member State's balance is not clear then the decision-maker should have a discretion whether or not to take this factor into account and what weight to give it in the balance if it does. In all situations, the Community Courts remain the ultimate arbiter on whether derogation is justified.

Given the political sensitivity of diagonal conflicts, the decision-maker should take special care to discuss such cases with all relevant Member States. Indeed, this sort of (highly political) matter is precisely the type which the Commission might reserve for itself as it can under Regulation 1/2003.

¹¹⁷⁰ Although it is debatable whether the Commission actually balanced in this way, because, as Chapter Two explained, the CFI found that the Commission's decision was not informed by employment considerations. Furthermore, the Commission argued that no link had been proven between the closure of the German factories and the opening of the Setúbal project, the *Matra Case*, paragraph 96. If this had not been the case, then it should have considered the issue.

¹¹⁷¹ Prior to Regulation 1/2003, Schmid (2000), pages 168-170, suggested that the burden of proof may also have to be re-analysed where Member States' objectives are considered. He would probably say the same today.

¹¹⁷² It must also be seen to do this. It will be tempting for Member States' courts and competition authorities to, for example, take more account of the effect of an agreement on employment within the jurisdiction of their State, as opposed to that within other Member States, or the Community as a whole. Such acts, or the perception of them, may also lead to tit-for-tat strategies. If a Portuguese court had decided the Commission decision, *Ford/Volkswagen* matter there may have been such a perception, even if this was not the case. Jones reports that the Bundeskartellamt wanted to prohibit the arrangement, Jones (2004), page 27. The Commission must be ready to intervene where bias seems likely. Bellamy suggests referring such cases to the Commission as an independent arbiter, Ehlermann (2001), page 271.

Before finishing this part we should also consider the different enforceability of public policy considerations, depending upon who is the enforcer and the origin of the policy in question. Regulation 1/2003 essentially relies on three types of 'body' for the enforcement of article 81, the Commission and Member States' competition authorities and courts.¹¹⁷³ In addition, the public policy considerations have three different origins. These are the policy-linking clauses, other Treaty aims and objectives, and the Member States' public policy. We examine each body in relation to each of these policy sources.

First, consider the Commission's application of article 81(3) of the Treaty. Could one insist that it take account of one of the Treaty objectives supported by one of the policy-linking clauses, for example, the environment, in its decision? Yes. The policy-linking clauses create mandatory obligations,¹¹⁷⁴ which the Commission is bound to respect.¹¹⁷⁵ If the Commission clearly did not consider environmental issues, where they were relevant to its decision, then one could appeal to the Community Courts (provided one has standing¹¹⁷⁶).¹¹⁷⁷ Some even allege that there is a presumption of direct effect in the Community system.¹¹⁷⁸ The Commission's wide discretion under article 81(3) means that the Community Courts would be unlikely to interfere with the weight that the Commission attributed to each objective, however.¹¹⁷⁹ In conclusion, the

¹¹⁷³ Regulation 1/2003, articles 4-6.

¹¹⁷⁴ Article 6, for example, says "Environmental protection requirements *must be* integrated..." [my emphasis] Although, Lane questions the justiciability of these clauses, Lane (1993), pages 957, 972 and 978.

¹¹⁷⁵ Article 211 of the Treaty says "...the Commission shall: ensure that the provisions of this Treaty...are applied..."

¹¹⁷⁶ See Kerse (1998), chapter 9.

¹¹⁷⁷ See, Case C-233/94, *Federal Republic of Germany v. European Parliament and Council* [1997], paragraphs 45 and 48. See also, Advocate-General Cosmas "...the last sentence of the first subparagraph of paragraph 2 of Article 130r [now essentially article 6] of the Treaty appears to impose on the Community institutions a specific and clear obligation which could be deemed to produce direct effect in the Community legal order. It expressly states that: "Environmental protection requirements must be integrated into the definition and implementation of other Community policies.", Case C-321/95P *Stichting Greenpeace Council and Others v. Commission* [1998], paragraph 62. The ECJ was silent on the point; and the Opinion of Advocate-General Lenz in Case C-360/92P *Publishers Association v. Commission* [1995], paragraph 60. This is also the implication of Case C-180/96 R *United Kingdom of Great Britain and Northern Ireland v. Commission* [1996], paragraph 63. See also, Dhondt (2003), pages 144-147; McGillivray and Holder (2001), page 154; Cunningham (2001), pages 158-160; Stuyck (2000), pages 386 and 387; Jans (2000), page 277; Grimeaud (2000), pages 216 and 217; Whelan (1999), page 50; Bär and Kraemer (1998), pages 318 and 319; Woods and Scholes (1997), pages 50 and 51 and Baldock (1994), page 7. Bourgeois and Demaret (1995), page 73, accept this possibility in light of the article 6 language. Krämer (2003), page 21, doubts this formulation saying that environmental protection must be taken into account in all other policies, but not every individual measure. However, Community competition policy is essentially defined through the individual measures so perhaps here his argument carries less weight? See Chapter Two.

¹¹⁷⁸ Wathélet (2003), page 369.

¹¹⁷⁹ Case C-284/95 *Safety Hi-Tech Srl v. S. & T. Srl* [1998], paragraph 37, says there must be a 'manifest error of appraisal'. It was also the implication from the *Échirolles Case*, paragraph 25, see Chapter Two. See also, Bailey (2004), page 1328; Grimeaud (2000), pages 216 and 217; Whelan (1999), page 50; Bär and Kraemer (1998), pages 318 and 319 and Evans (1981), pages 434-436. This is particularly true of policy-linking clauses such as article 151 (culture). It is possible that, where a high level of protection is demanded (such as article 152(1) (public health)), the Community Courts would be more likely to intervene if they thought that the objective had been given insufficient weight in the balance. See the discussion in Dhondt (2003), pages 147 and 148.

Commission *must* consider the policy-linking clauses' objectives when it conducts the balance. However, because of the enormous discretion it is given, the Commission can invariably decide *what weight to give them*.¹¹⁸⁰

For Treaty objectives without a policy-linking clause the position is different. It would be extremely hard to show that specific objectives should be considered, even when it seems clear they would contribute to, for example, the article 2 aims. In effect, this means that while the Commission *can* consider them,¹¹⁸¹ it, in fact, has a *discretion* about whether or not it *will* consider them within the balance in a particular case.¹¹⁸² The same position arises in relation to the consideration of Member State public policy issues in article 81 of the Treaty, where they are not protected by a policy-linking clause. In effect, the Commission has more leeway to ignore objectives where there is no policy-linking clause.¹¹⁸³

Where the enforcer is a Member State's competition authority the position is probably similar, although the reasoning is a little more complex. As regards the policy-linking clauses, most are not directed at the Member States. Nevertheless, one can probably argue that they should take Treaty objectives into account in their decisions for three reasons. First, they have the article 10 duty of co-operation. Secondly, Regulation 1/2003 stresses the need for consistency in the application of the competition rules,¹¹⁸⁴ and the Commission will be bound by the policy-linking clauses in its decisions, see above. Finally, further comfort might be gained, from the Community Courts' increasing reliance on interpreting the scope and application of provisions of Community law in accordance with general principles of law and the ECHR.¹¹⁸⁵ Temple Lang explains this by saying that, in such circumstances, the Member States are acting as agents or delegates of the Community in implementing its policies.¹¹⁸⁶ Whatever the motivation, the

¹¹⁸⁰ We argue above that the position may be somewhat different where the policy-linking clause relates to a Member State interest.

¹¹⁸¹ Environmental issues were considered before the policy-linking clause, see, for example, McGillivray and Holder (2001), pages 152-154.

¹¹⁸² Although, in Case C-180/96 R *United Kingdom of Great Britain and Northern Ireland v. Commission* [1996], paragraph 63, the ECJ referred to article 3(1)(p) on public health. One might argue that this was to show that the Commission should consider health issues in its Common Agricultural Policy decisions. This might be one way of showing that certain objectives should have been considered? In that case though the ECJ also referred to the policy-linking clause for health, and this might have made a difference.

¹¹⁸³ In theory, if the Commission does not exercise its discretion in a way that pleases the Member States, then they can introduce more policy-linking clauses in later Treaty changes. In fact, this seems increasingly unlikely in a community of 25 states. This is an argument for giving the Commission even more discretion here.

¹¹⁸⁴ Regulation 1/2003, recital 21 and article 16(2). Admittedly, article 16 only says that Member States' competition authorities "...cannot take decisions which would run counter to the decision adopted by the Commission." Nevertheless, if the Commission is bound to take account of the policy-linking clause then one might argue that the Member State body should foresee this and do the same, to avoid a potential future conflict.

¹¹⁸⁵ Craig and de Búrca (1998), pages 320-323.

¹¹⁸⁶ Temple Lang (1991). For similar ideas see Constantinesco (1985), page 44.

same logic should apply when the Member States' competition authorities apply Community competition policy through article 81 of the Treaty. This means that the Member States' competition authorities probably should consider the objectives protected through the policy-linking clauses. However, if they do this, it is unlikely that, on appeal, the Community Courts would change the balance they ultimately arrive at.¹¹⁸⁷

The same would apply to Treaty objectives not protected by a policy-linking clause. However, as with the Commission, the difficulty of establishing that such a policy should have been considered means that, in fact, there is a large discretion for the decision-maker to ignore the issue.

As regards the Member States' competition authorities' application of Member State objectives, the position is probably the same as it was for the Commission. The Community Courts would be even less likely to interfere in the balance where the policy in question was that of the Member State represented by the competition authority taking the decision.¹¹⁸⁸ They might intervene more readily where the policy at issue was that of another Member State.

Finally, we examine the position of judgments of the Member States' courts. Here the arguments are somewhat easier. All three points raised above in relation to Member State competition authorities should also apply here.¹¹⁸⁹ The argument in relation to consistency under Regulation 1/2003 is even more powerful. Article 16(1) says:

"When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated."

In other words the Member States' courts must be even more wary of prospective Commission decisions than the Member States' competition authorities. In addition, there is the ECJ ruling from the *Bosman Case*, which was an article 234 action. The point in question revolved around whether article 39 could apply to rules laid down by sporting associations such as UEFA and

¹¹⁸⁷ Ehlermann has suggested that one effect of the modernisation proposals might be that the Community Courts will look more closely at decisions in relation to article 81(3) of the Treaty, Ehlermann (2000), page 39 and Ehlermann and Atanasiu (2002), pages 74 and 75. The Community Courts are unlikely to feel comfortable performing such an exercise, Craig and de Búrca (1998), pages 351-352.

¹¹⁸⁸ This could lead to political tension if a Member States' own competition authority gives 'disproportionate' weight to a national policy consideration. A challenge might lie in extreme cases, but normally the weighting of such issues is for the decision-maker and will not be reviewable, see above.

¹¹⁸⁹ See, for example, in relation to article 10, Lenaerts and Arts (1999), paragraph 5-032 and Craig and de Búrca (1998), pages 174 and 175.

FIFA, in other words, private individuals who were not Member States. Let's examine the argument of UEFA and the reply of the ECJ in this case.¹¹⁹⁰

"UEFA objects that such an interpretation makes Article 48 of the Treaty more restrictive in relation to individuals than in relation to Member States, which are alone in being able to rely on limitations justified on grounds of public policy, public security or public health.

That argument is based on a false premise. There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question."

Komninos suggests that the same logic applies when private individuals ask the Member States' courts to consider public policy arguments in article 81 of the Treaty.¹¹⁹¹ In our view the ECJ will likely apply the same logic to allow individuals to rely on public policy (both that of the Member States and of the Community) in article 81 actions before the Member States' courts. Once again, it will be hard to challenge the actual balance arrived at by the court.

2.3 Which markets should be considered when making the assessment?

Chapter Six argued in favour of a welfare analysis within article 81(1) of the Treaty. If such a test is confirmed there, it is likely that a consumer welfare approach will be taken. Chapter Five argued that a partial equilibrium approach to efficiency analysis was not desirable. One reason given was that a broader analysis gives a more complete picture of the agreement's costs and benefits.

Chapter Two acknowledged that the Treaty demands consideration of non-economic objectives within article 81. Chapter Six argued that they should be considered within article 81(3) of the Treaty. Where these other objectives are considered, the analysis should also be conducted on a 'global' basis, regardless of the relevant product and geographic markets concerned. Once again a more complete perspective is attained. This is particularly important, as many costs and benefits of the non-economic objectives are externalities to the welfare assessment. Their effects can often be felt far away from the relevant markets.

2.3.1 Product Market Based Limits to the Analysis

An agreement relating to one product market can have effects on other product markets too. If we ignore these effects, then this may alter whether or not the agreement is considered for exemption under article 81(3).

¹¹⁹⁰ Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL and Others v. Jean-Marc Bosman* [1995], paragraphs 85 and 86.

¹¹⁹¹ Komninos (2005) DRAFT, pages 12 and 13. He considers the mandatory requirements in the *Wouters Case*.

Chapter Five showed how agreements in one product market could affect the economic efficiency in other product markets. For example, increasing the cost of trade with a region, by raising the cost of shipping goods to and from the area, can affect the development and growth of those trading in and with this region. Shipping cartels almost certainly contribute to higher shipping costs. They likely have knock on effects on the trade in the products they carry. This may reduce welfare in the liner shipping market. The affects on other product markets can be important too. This is especially so where the underlying goods are things like textiles where transport costs make up a large proportion of the price, reducing welfare there too.¹¹⁹²

Considering these other markets may also bring development policy into play where product markets relating to developing countries are affected. One of the justifications for horizontal price-fixing given in Council Regulation, *Shipping Cartels* was the positive effects on developing countries created by liner conferences from the developed world.¹¹⁹³ Whether or not we agree with the logic of the block exemption, other product markets seem to have been taken into account by the Council when writing it. This makes sense. Development policy was considered even though this was well before article 177 was introduced.

In a world where the relationships between product markets are inextricably interlinked, such effects are common. The relationship between the product markets might be close,¹¹⁹⁴ or it could be much more distant, as in the shipping example. This applies in relation to economic efficiency. It also applies to non-economic objectives. We have just seen how development policy might be affected in other relevant product markets. Chapter Four also discussed how environmental policy could also be affected in different product markets.¹¹⁹⁵

These effects can be extremely important. To ignore them would provide a very incomplete picture. The same is also true in relation to the need to examine other geographic markets.

¹¹⁹² Townley (2004).

¹¹⁹³ On 6 April 1974 an agreement was signed under the auspices of UNCTAD. The UNCTAD Liner Code, established generally agreed norms relating to the conduct of liner conferences. It sought, according to its preamble, "...to improve the liner conference system...[whilst] [t]aking into account the special needs and problems of developing countries..." The UNCTAD Liner Code was intended to allow countries without a strong merchant fleet to develop one, as well as helping to counteract the anti-competitive actions of liner conferences. Recital 4 of Regulation 4056/86 concludes that "...as far as conferences subject to the Code of Conduct are concerned, the Regulation should supplement the Code or make it more precise..."

¹¹⁹⁴ As in Commission decision, *TPS*, for example.

¹¹⁹⁵ Other examples can be found in Commission decisions, *Asahi/ Saint-Gobain*, paragraphs 24-26 and *Philips-Osram*, paragraph 27. Also note the significance that the Commission places on the public health effects in *Asahi* in Commission, *RCP 1994*, pages 353 and 354.

2.3.2 Geographic Market Based Limits to the Analysis

From an economic efficiency perspective, anti-competitive effects in one geographic market can have important effects in other geographic markets, see Chapter Five. Is this also true for non-economic objectives?

Some Treaty objectives, such as environmental protection and public health, often concern worldwide problems requiring worldwide solutions. It would be artificial and ineffective to disregard any effects (or contributory factors) outside of our borders. It might also breach the Treaty. Article 152(1) of the Treaty says:

"Community action...shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education."

There is no reference to the fact that only the health of those in the Community is relevant.¹¹⁹⁶ The idea that an international dimension to public health is important is supported in the Treaty, article 152(3) says that the:

"...Community and the Member States shall foster co-operation with third countries and the competent international organizations in the sphere of public health."¹¹⁹⁷

Indeed, some Community action is already aimed at improving public health in other countries.¹¹⁹⁸ Secondly, it is clear that R&D has a key role to play here, and that often means that undertakings should get involved.

Even if it were only the public health of those in the Community that is important, this does not necessarily mean that an isolationist approach is best.¹¹⁹⁹ For example, in relation to SARS, the Community found it necessary to co-operate with, amongst others, China, in order to better protect the health of those within the Community. Research and development activities outside of the Community could also benefit those suffering from SARS, or other diseases, within it.¹²⁰⁰

It may be that an agreement between pharmaceutical firms could help achieve these aims. As well as the economic effects of such an agreement, its effect on public health worldwide should be considered in the article 81 analysis. To hold otherwise would be a slap in the face for the

¹¹⁹⁶ A similar point applies in relation to consumer protection. Although, in relation to public health, the Treaty refers to the '...the living and working condition of their peoples...', see the Preamble.

¹¹⁹⁷ See also documents such as, Press Release, IP/03/1091.

¹¹⁹⁸ See, for example, COM(2000) 585. See also recommendations for the future, such as, Press Release, IP/03/1091.

¹¹⁹⁹ See, for example, Press Release, IP/03/1091.

¹²⁰⁰ See, for example, Extraordinary Council meeting, *Employment, Social Policy, Health and Consumer Affairs* (2003).

new, humane, face that the Community has been cultivating.¹²⁰¹ It also risks undermining the objectives the Community is bound to embrace.

A similar position emerges in relation to environmental policy. Article 174(1) of the Treaty specifically says that the Community policy on the environment:

"...shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures *at international level to deal with regional or worldwide environmental problems* [my emphasis]."

It is clear that acting alone the Community cannot do much to counteract global warming or the depletion of the ozone layer. Environmental policy must have an international dimension, see also article 174(4) of the Treaty.¹²⁰² This international dimension is also important when environmental policy is incorporated into article 81. Exclusively looking at effects within the Community is a nonsense and ineffective.¹²⁰³

There are other Treaty objectives, such as development policy, which, by definition, require an extra-Community analysis. Article 177(1) is very wide:

"Community policy in the sphere of development cooperation...shall foster: the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; the smooth and gradual integration of the developing countries into the world economy; the campaign against poverty in the developing countries."

The boundaries of such a policy are extremely unclear. Does social and economic development include a cultural policy for developing countries?¹²⁰⁴ Surely, it would include consumer protection policies;¹²⁰⁵ environmental protection;¹²⁰⁶ industrial policy; public health¹²⁰⁷ and research and development aimed at helping these countries,¹²⁰⁸ wherever it was undertaken? The Commission has underlined that:¹²⁰⁹

¹²⁰¹ See, for example, Collège d'Europe (1998), pages 214 and 220.

¹²⁰² Collège d'Europe (1998), page 226.

¹²⁰³ The same might easily be said of the security of the fuel supply in other countries. If there were another oil shock, for example, this could affect their ability to sell the Community the things it needs and to buy from the Community. This would affect the Community's industrial policy.

¹²⁰⁴ COM(2000) 212, pages 6 and 23.

¹²⁰⁵ COM(2000) 212, page 13.

¹²⁰⁶ COM(99) 499 and Council Report, *The Integration of Environment into Economic and Development Co-operation* and SEC(92) 1986, page 6.

¹²⁰⁷ See, for example, COM(2002) 129.

¹²⁰⁸ COM(2000) 212, pages 6 and 10.

¹²⁰⁹ COM(2000) 212, page 16.

"Today, there is a wide consensus that poverty cannot be defined merely as the lack of income and financial resources but should be recognised as a multi-faceted concept. This new definition includes deprivation of basic capabilities and encompasses non-monetary factors such as the lack of access to education, health, natural resources, employment, land and credit, political participation, services and infrastructure. It also covers the risk dimension and the notion of vulnerability. Reducing poverty therefore implies addressing these economic, political, social, environmental and institutional dimensions."

The Commission has said that the private sector is a key actor in the development process.¹²¹⁰ It has also said that competition policy should take account of development policy.¹²¹¹ These effects too must be taken into account in an article 81 analysis.

There are some Treaty objectives, such as culture and economic and social cohesion, that less readily lend themselves to an analysis of effects outside of the Community. Environmental policy, public health, security of energy supply and development policy all seem to require such an approach. As regards objectives such as research and development, and possibly consumer protection, insofar as they do not apply to any of these four policy fields, a question mark remains.

2.3.3 Conclusion of Section 2.3.

Within the Treaty's limits, the decision-maker should look at the effects on different product and geographic markets even here. As globalisation takes hold, and the world's economies become increasingly inter-related, it is more and more artificial to confine our analysis to one jurisdiction¹²¹² or one product. A partial equilibrium approach is insufficient in economic analysis, Chapter Five; it is also problematic in relation to other non-economic objectives.

Furthermore, it is often in the Community's interest to encourage increased competition over the long term, wherever it originates. This is so not only as regards that specific issue, but this should also encourage reciprocity for the Community's openness. In relation to industrial policy, for example, the Commission normally works to achieve this through opening up markets to competition and encouraging R&D, as opposed to favouring particular industries in the more traditional version of such a policy, see Part B. These ends are also promoted via the approach advocated above. This is especially so if one does not only look at the effects within the specific product market in question. For example, encouraging medical R&D into stress by two US companies (by exempting a co-operation agreement between them on these grounds) may make things more difficult for their European competitors. But finding a cure would have a profound effect, even from a purely economic perspective, on all areas of European (and worldwide)

¹²¹⁰ COM(2000) 212, section 3.4.

¹²¹¹ COM(2000) 212, page 13.

¹²¹² Collège d'Europe (1998), page 263.

trade, which would likely be extremely positive for European industry¹²¹³ (as well as those in other jurisdictions).

A 'global' approach to assessments under article 81 could create enormous evidentiary and political problems. An agreement may affect markets far removed (both geographically and product-wise) from those of the parties to an agreement. These effects will be difficult for the parties, as well as the relevant decision-maker, to assess. There may even be sovereignty problems in relation to accessing certain information outside the Community's jurisdiction. Certainly, involving outside agencies will affect the timing, coherence and possibly even the quality of the final decision, see Chapter Five. We must find a way to reduce the difficulty (and increase the transparency and predictability) of the analysis (balancing) for the decision-maker, and the parties to the agreement. This should be based on eliminating the consideration of irrelevant Treaty objectives and also those where the effects are not appreciable. How might this be done? Chapter Eight offers some suggestions.

2.4 Are the aims of the parties to the agreement relevant?

The final issue to consider here is whether the relevant objectives can only be taken into account in this first article 81(3) test if the aim, as well as the effect, of the agreement is to promote them. At first sight a requirement related to intention is attractive. It gives the impression that improper or immoral conduct is being punished.¹²¹⁴ It also (superficially) mirrors the 'object and effect' wording under article 81(1) of the Treaty.¹²¹⁵

In the *VBVB/VBBB Case*, the parties argued that the Commission should take account of the cultural effects of the agreement. The Commission replied "...it is unacceptable for organisations representing commercial interests to make a show of cultural arguments so as to infringe the Community competition rules." The Commission later referred to the cultural factors in this agreement as being "...adventitious..."¹²¹⁶ The Commission did not believe that the parties' agreement had been motivated by cultural objectives in this case.¹²¹⁷ The fact that the agreement might, in fact, promote cultural factors did not seem to be sufficient.¹²¹⁸

¹²¹³ The International Labour Organisation issued a report (ILO, *Mental Health in the Workplace*), stating, for example, that in the UK some 5 million working days are lost annually due to stress, depression and anxiety.

¹²¹⁴ Areeda and Hovenkamp (2000), page 135.

¹²¹⁵ I say superficially because the 'object' assessment under article 81(1) of the Treaty is not a subjective notion, see B&C (2001), paragraph 2-097.

¹²¹⁶ The *VBVB/VBBB Case*, page 48.

¹²¹⁷ Additionally, the Commission said that cultural motivations were irrelevant to an article 81(3) analysis, page 48.

¹²¹⁸ The Commission seems to make a similar point in Commission, *Article 81(3) Guidelines*, paragraph 47.

The ECJ confirmed this approach in the *Verband Case*.¹²¹⁹ There the applicant represented, promoted and protected the business interests of insurers providing industrial fire and consequential loss insurance. The applicant was authorised to carry on business in Germany. In 1984 the Commission found that the applicant's attempt to re-establish stable and viable conditions in the insurance sector, by recommending increases in premium rates of 10, 20 and 30% in specified circumstances, infringed article 81(1) of the Treaty. It refused an article 81(3) exemption. The applicant made an article 230 reference.

In relation to article 81(3), the applicant argued that the measure was objectively necessary to re-establish the profitability of insurance companies and that it safeguarded the interests of the insured. The ECJ, paragraph 58, held that the Commission was right in saying that its task was not only to check:

"...whether the aim of the recommendation was to deal with the actual problems confronting the market as a result of the continuing fall in premiums...and to consider whether the recommendation was a means of dealing with that situation, but also to assess whether the measures put into effect by the recommendation went beyond what was necessary to that end. [my emphasis]"

The ECJ found that this was not the case because a global premium increase was not necessary to achieve the intended objective.¹²²⁰

It seems that when it refers to the aim of the agreement the ECJ means the reason why the agreement was adopted. The point being that if the reason why the undertakings entered into the agreement was not, for example, environmental protection, then it is not sufficient that their agreement actually benefits the environment under article 81(3) of the Treaty.

This would have a serious impact on the ability to use non-economic objectives within article 81(3). Undertakings are normally motivated by the profit that they think that a particular strategy will generate for their shareholders, not by whether their agreements are environmentally friendly. This does not mean that their agreements do not also benefit others,¹²²¹ just that this is not normally the aim of the agreement.

Why did the Commission and the ECJ insist that the aim of the agreement, as well as its effect, must be to achieve these Treaty objectives? Perhaps they feared that the Commission would be inundated with claims that agreements, though restrictive, incidentally had beneficial effects upon the environment, employment and other relevant Treaty objectives?

¹²¹⁹ Case 45/85 *Verband der Sachversicherer e.V. v. Commission* [1987].

¹²²⁰ The *Verband Case*, paragraph 60.

¹²²¹ For example, think of the provision of free anti-retroviral drugs to their infected workers by Anglo American, AngloGold, De Beers, Old Mutual and Transnet, see *Strategic Caring*, *The Economist*, 3 October 2002 and *Digging Deep*, *The Economist*, 8 August 2002.

While the Commission must ensure that agreements comply with the Community's social and other aims (to the extent that this is allowed within, for our purposes, article 81), to insist that undertakings actually embrace and pursue these aims as their primary goals is unnecessary. The undertakings' intention is irrelevant. The important issue is whether or not, *in fact*, an agreement achieves the non-economic aims.¹²²² Furthermore, these demands risk imposing higher costs on firms, reducing the likelihood of "beneficial interventions" in the future. This condition also risks reducing welfare, including consumer welfare, to a significant degree. Perhaps even more seriously, these notions undermine the rationale of capitalism itself and the effect of the "invisible hand". By which we mean that, in a competitive market, even if individuals act selfishly, their acts can benefit society as a whole.¹²²³ Most economists believe that a company's primary duty is profit maximisation.¹²²⁴ In many companies, to act otherwise may even breach the directors' fiduciary duty to their shareholders.

Two other objections are worthy of mention. Introducing a requirement related to the agreement's aim merely adds a requirement of form. Sophisticated companies can easily add into the recitals of the agreement, and their board minutes, the fact that the agreement aims to protect a relevant non-economic aim. This should allow them to get round this problem, unless the Commission will also check for lies (which would be hard to show). Smaller companies may make just as big a contribution to, for example, the environment with their agreements, but because of the failure to follow the form this might not count in the eyes of the Commission. Secondly, such requirements also risk stifling criticism of the balance. Third party undertakings, often the best-placed entities to complain to the Commission or others, run the risk that if they complain the aims in their own agreements (which are likely to be similar to their competitors) may be questioned too. This might discourage exemption of their own agreements under article 81(3) too.

This requirement is not seen in all cases. It should not be raised at all. The decision-maker controls the exemption process. It can ensure that the optimal balance has been struck. If the Commission and the Community Courts insist that the object of an agreement, as well as its effect, be to further these Treaty objectives they set the decision-maker an impossible task. How can it properly assess what the true aims of the parties are? It also twists corporate motivations, often in a welfare reducing way. Better surely to look merely at the effects which can be ascertained more "objectively".

¹²²² Lenz (2000), page 70.

¹²²³ See Hildebrand (2002), page 112.

¹²²⁴ See, A. Smith (1976 Re-print), pages 477 and 478; Friedman (1962), page 133 and Henderson (2001), page 3.

2.5 Conclusion of Section 2

The balancing test under article 81(3)'s first condition, as interpreted by the Community Courts, is (and should remain) extremely broad.

We have argued that there should be a full balancing exercise, not only considering how an agreement helps achieve relevant (Community and Member State) objectives, but examining how it undermines them as well. This analysis should include (potential) effects outside of the relevant markets. The subjective aims of the parties when concluding the agreement should not be relevant.

Interpreting article 81(3)'s first condition as widely as is recommended here should have many benefits. It means that the decision-maker will be able to consider most relevant objectives that are affected by the agreement, whatever they are and wherever the effects are felt. Once these objectives can be overtly considered then decision-makers will be under less pressure to distort other parts of the article 81 analysis in order to achieve similar aims.¹²²⁵ This should lead to more transparent reasoning and predictable definitions there.

Such a wide definition of the first condition also imposes some costs. As already mentioned, it would be both politically and evidentially difficult to assess every single effect that an agreement has. This should not be exaggerated. In most cases only arguments relating to economic efficiency, and possibly those relating to market integration, are raised. In most other cases only one or two objectives are considered.¹²²⁶ True, the number of non-economic objectives discussed will probably increase once it is clear that they are relevant. Nevertheless, in most cases these will not be appreciable, see Chapter Eight.

There are a number of institutional reasons for the limited consideration of non-economic objectives within article 81 of the Treaty. The first relates to the method of bringing cases. Most often the Commission takes a position either as a result of a notification to it or because of a complaint. Because of the lack of clarity about the worth of raising arguments that do not relate to economic efficiency these are often ignored by applicants and complainants in such matters. This problem is exacerbated by commercial anti-trust lawyers who often think solely in terms of economic efficiency, as opposed to considering other Treaty objectives, which might be relevant in their case. Not only that, but because, until now, arguments have principally (although not

¹²²⁵ In relation to how the definition of 'undertaking' is affected by non-economic objectives, see Townley (2005). For similar issues in relation to the definition of: a 'restriction of competition', see the *Albany* and *Wouters Cases* (respectively the Community objective of promoting certain collective labour agreements and the Member State objective of the administration of justice), Chapter Two; and, an 'affect on trade between Member States', see the *Leclerc Case* (the Member State objective of culture), discussed in Chapter Two.

¹²²⁶ Aleinikoff (1987), page 977 and following, says courts often narrow down the issues they will consider in this kind of balancing exercise. He criticises this because he feels that this tendency can be at the expense of getting the right answer. Many other public bodies probably only base their decisions on a few underlying objectives too.

exclusively¹²²⁷) been made by companies that operate in the same or a related field as that in which the agreement will operate then they may be reluctant to raise policy arguments from other areas of the Treaty, in the belief that such arguments may be raised against them in future cases.

To a certain extent these considerations do not apply in relation to Treaty objectives such as market integration and, increasingly, protection of the environment. This may well be because these are now such established areas of discussion in article 81 cases that interested parties are confident that they will at least be considered relevant by the Commission. Furthermore, as they are now so well established there is little point in a firm avoiding reliance on such Treaty aims in the hope that they will not be raised in relation to it in the future. Finally, DG Competition will be more willing to rely on such 'fashionable' arguments in the knowledge that when the rest of the Commission comes to vote on a decision they are likely to accept them as relevant.

A number of mechanisms are likely to encourage change. First, if the Commission were to adopt a clear underlying objective, or set of objectives, in relation to its article 81 decision-making then this would increase clarity in this area. This would make it more likely that interested parties would use such arguments in their submissions. It would also increase the confidence of case officers to rely on such arguments in their decision-making. Secondly, at an early stage in the case the decision-maker might make more effort to consider the matter from a number of perspectives in order to ascertain the impact of the agreement outside of the economic sphere. This approach would be aided by DG Competition's attempts to get consumer organisations and other entities involved that can provide specialist information in relation to the underlying subject matter of a particular agreement. Such bodies may also be more willing to provide relevant information where their business interests are unlikely to be negatively affected by the Commission relying on such an objective now or in the future. This strategy is also likely to be enhanced by a greater specialisation in relation to the underlying subject matter of case handlers. It would also be advisable to involve other DG's and government agencies in cases as early as possible, so that it can get better input about the likely effect of particular

¹²²⁷ The Commission increasingly seeks to involve consumer organisations, COM(96) 520, page 7, "An efficient Single Market needs strong consumer organisations with access to clear information and instruments to represent and enforce consumers' rights" Resolution of the European Parliament on the Commission's XXVIIIth Report on Competition Policy (1998) in Commission, *RCP 1999*, page 383 (points 7-9) "Takes the view that the further development of competition policy must be accompanied simultaneously by a comprehensive consumer protection policy and better involvement of consumer organisations..." The Commission answered on the same page, "To promote competition on the market is also to defend consumer interests. The Commission is convinced of this, and shares Parliament's view as regards greater involvement of consumer organisations in competition policy. In this connection, the Commission has launched a number of initiatives aimed at consumers and the organisations representing them."

agreements in relation to other Community action plans.¹²²⁸ Finally, the problems that many relevant objectives would cause might encourage frivolous litigation.

Chapter Eight provides a framework for balancing that should help to reduce these problems. This involves more clearly describing various objectives' weight in the balance, application of the appreciability doctrine to non-economic objectives, etc. Chapter Five also advocated limiting the investigation of affects to those in the relevant markets, unless major environmental or other problems would be overlooked by this method. Siragusa also suggests limiting the period for which exemption decisions can apply before they are reassessed.¹²²⁹ Other limits are implied through article 81(3)'s other three tests, discussed below.

Clear descriptions of how to implement the balance will reduce the problems involved. This chapter aims to help fill this gap. Over time, the application of these (or similar) guidelines in concrete cases will also help. However, compromise is difficult and can never be entirely predictable, Chapter One. Every case is different and value judgements must be made about the optimal balance *in each case*. The presence of this discretion should be celebrated. Legal certainty is not the only value legal systems espouse. There is also justice and fairness. While the decision-maker should be guided, their hands should not be tied.

The Council and European Parliament agree that non-economic objectives, including Member State ones, should be dealt with under article 81(3) of the Treaty, see Chapter Two.

The clarifications that have been suggested in Section 2 could all be implemented by the Community Courts in subsequent cases. Some suggest that article 81(3)'s first test should be rewritten to show that non-economic issues can be considered there.¹²³⁰ This would be relatively simple. The conclusion to Part C provides a revised draft text for the whole of article 81(3) of the Treaty. If the Community Courts prove unwilling to follow the recommendations above, then this approach should be considered. There is a risk that, once article 81 is opened to discussion, the Member States would advocate more extensive 'populist' changes. That is always a risk in a democracy.

¹²²⁸ The flipside of this approach is for undertakings to talk to other DGs and to try to get them to accept their agreements, at least in principle, before raising the matter with DG Competition, or at least to ensure that the agreement is in line with a Community action plan or initiative. This was the case in relation to both the *ACEA* and the *CEMEP* matters, respectively, Commission, *RCP 1998*, paragraph 131 and page 151 and Press Release, *Commission clears European manufacturers' agreement to improve energy efficiency of electric motors*, IP/00/508. Support for this proposition, at least in relation to environmental matters, is provided by Commission, *Vertical Guidelines*, paragraph 171.

¹²²⁹ Siragusa (1998), page 486. This was the position under Regulation 17, article 8. There is a suggestion that this is no longer possible under Regulation 1/2003, see Geradin (2004), page 15.

¹²³⁰ See, Kirchner (1998), pages 515, 518 and 519 and Monti (2002), pages 1096-1099.

3. THE SECOND ARTICLE 81(3) TEST: CONSUMERS MUST GET A FAIR SHARE OF THE RESULTING BENEFIT¹²³¹

The second article 81(3) condition states that the agreement must allow "...consumers a fair share of the resulting benefit..." This provision raises three main problems. What is a benefit; who is a 'consumer' and how much of the resulting benefit should consumers get?

The Commission focuses on economic benefits in Commission, *Article 81(3) Guidelines*.¹²³² There is widespread agreement that non-economic benefits are also relevant,¹²³³ even though only economic benefits are normally considered. The Commission has considered such objectives there in the past.¹²³⁴ In Commission decision, *Philips-Osram*, for example, it said:

"The use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities."¹²³⁵

The Commission would probably say the same today, remember that it has said that:

"Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of article 81(3)..."¹²³⁶

The Treaty does not define the concept of a 'fair share' either.¹²³⁷ The Commission has said:

"The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under article 81(1)."¹²³⁸

It is hard to produce a precise definition in the abstract.¹²³⁹ Lyons believes that, at least, one can say that the consumer benefits cannot be negative.¹²⁴⁰ Despite this, the decision-maker has a lot of discretion,¹²⁴¹ and, in the past, a fair share has been established relatively easily.¹²⁴²

¹²³¹ Thanks to Heli Askola, Galina Cornelisse, Johanna Engstroem, Poul Noer, Assimakis Komninou, Tobias Witschke and Lorenzo Zucca for their comments on the different language versions of the Treaty.

¹²³² Commission, *Article 81(3) Guidelines*, paragraphs 83-104.

¹²³³ Whish (2003), page 157; Vedder (2003), pages 170-174; Monti (2002), page 1075; Jans (2000), page 280; Bouterse (1994), page 28 and Jacobs (1993/2), page 56. Although, Goyder (2003), page 123, only refers to economic advantages, he does not expressly reject non-economic ones.

¹²³⁴ Even, arguably, when economic benefits were not present, Commission decisions, *Jahrhundertvertrag* and *VIG-GVS*, paragraph 32 and *International Energy Agency* (1994), paragraph 6(b).

¹²³⁵ Commission decision, *Philips-Osram*, paragraph 27. See also, Commission decisions, *KSB/ Goulds/ Lowera/ ITT*, paragraph 27; *REIMS II*, paragraphs 77-85 and *CECED*, paragraphs 47-57. In *CECED* the first and second tests under article 81(3) are taken together here, so it is difficult to know how important environmental issues were under each head.

¹²³⁶ Commission, *Article 81(3) Guidelines*, paragraph 42. See also paragraph 89. Furthermore, it is the overall benefit that is relevant, there is no need for consumers to participate in all benefits, they must just be better off overall, Commission, *Article 81(3) Guidelines*, paragraph 86 and Jacobs (1993/2), page 56.

¹²³⁷ Lyons (2002), page 1.

¹²³⁸ Commission, *Article 81(3) Guidelines*, paragraph 85.

¹²³⁹ Whish (2003), page 156.

These issues are important, but the focus of Section 3 is the definition of 'consumer', for article 81(3) purposes. The concept of a 'consumer' in article 81 is unclear. Perhaps as a result of this, the Commission has not defined it consistently. We examine the Commission's latest interpretation of this term and discuss the implications of this for balancing non-economic objectives within article 81 of the Treaty.

Who is a consumer? The *Oxford English Dictionary* defines this as a purchaser of goods or services. But there is an important subtlety. It can be any purchaser, but there is an inference that the purchaser is "...an individual who buys goods and services for personal use rather than for manufacture, processing or resale.",¹²⁴³ for the purposes of Section 3, 'private end-users'.

Many of the different language versions of the Treaty employ an equivalent word to 'consumer', implying that an agreement can only be exempted if it can be shown that a fair share of the resulting benefit goes to private end-users.¹²⁴⁴ Other language versions utilise the more ambiguous term 'user', which could include private end-users, but also embraces those that will use these goods or services for manufacture, processing or resale, including those that buy from the parties to the agreement.¹²⁴⁵

It may be helpful to illustrate the distinction by way of an example. Imagine that two companies, A and B are both manufacturers of sulphuric acid. They set up a joint purchasing pool for sulphur. A and B sell all their sulphuric acid to C and D. C, a large multinational, uses all of its sulphuric acid in a further industrial process to make synthetic detergent. C sells the synthetic detergent directly to private end-users, E, in its factory shop. D is a wholesaler that sells all of its sulphuric acid to privately owned schools, F. Pupils, G, attend chemistry lessons at F, from whom they buy sulphuric acid for their experiments in class.

If the agreement between A and B falls within article 81(1) it will require exemption under article 81(3) of the Treaty. For this to happen, amongst other things, consumers must get a fair share of the agreement's resulting benefit. But who are the consumers? Are they those that: (i)

¹²⁴⁰ Lyons (2002), page 1.

¹²⁴¹ Jones and Sufrin (2001), page 196.

¹²⁴² See, Reich (1997), page 133, and the references made there; Faull and Nikpay (1999), paragraph 2.156 and Bourgoignie (1985a), page 430.

¹²⁴³ Ammer and Ammer (1977).

¹²⁴⁴ This interpretation is supported by the Danish language version of the Treaty, "forbrugere"; the Finnish language version, "kuluttajat"; the German language version, "Verbraucher"; the Greek language version, "katalalotes"; as well as the Swedish language version, "konsumenterna".

¹²⁴⁵ This is the implication of the Dutch language version, "gebruikers"; the French language version, "utilisateurs"; the Italian language version, "utilizzatori"; the Portuguese language version, "utilizadores"; and the Spanish language version, "usuarios".

'consume' the sulphuric acid, in this case G (as C is not using it in a private sense); or (ii) those that use the sulphuric acid, even in a business sense, in this case C, D, F and G? The English version of the Treaty suggests the former; the French version of the Treaty suggests the latter.¹²⁴⁶

The Commission does not normally articulate who the consumer is when it applies this provision. On the rare occasions that it does, it has not adopted a consistent approach.¹²⁴⁷

- sometimes, the Commission only considers the benefits of those that buy directly from the parties, whether or not they are end-users, in our example, C and D;¹²⁴⁸
- sometimes, the Commission considers the benefits for the end-users of the relevant product. Even here the Commission is not consistent:
 - sometimes it confines itself to an examination of the benefits for end-users, in our example, C and G;¹²⁴⁹
 - it often assesses the benefits to those in the distribution chain between the parties to the agreement and the end-users, in our example, C, D, F and G;¹²⁵⁰
- sometimes, the Commission considers the benefits for the 'consumers' of the products made with the relevant product, in our example, E. Here the Commission has confined itself to an examination of the benefits for the end-users of the derived product,¹²⁵¹ ignoring those higher up the distribution chain;

¹²⁴⁶ The definition could be widened even further by assessing the agreement's effects on those that 'consume' or 'use' products *derived from* the sulphuric acid too. In this case, E would be included too.

¹²⁴⁷ Except in one sense. In a vertical agreement, the buyer of the products covered by the agreement is normally one of the parties to the agreement (by definition). The Commission is not interested in any benefits the parties may get from the agreement in relation to this provision, see Commission decision, *P&I Clubs*, paragraphs 40 and 41 and Commission, *Article 81(3) Guidelines*, paragraph 84.

¹²⁴⁸ Commission decisions, *Enichem/ICI*, paragraphs 38 and 39 and *Bayer/ BP Chemicals*, paragraphs 32-34.

¹²⁴⁹ Commission decisions, *SPCA - Kali und Salz*, page 5; *Kali und Salz/Kali Chemie*, pages 25 and 26; *Beecham/ Parke, Davis*, paragraph 38; *Vimpoltu*, paragraph 49; *Synthetic Fibres*, paragraphs 39-41 and *LH/ SAS*, paragraphs 74 and 75.

¹²⁵⁰ Commission decisions, *Uniform Eurocheques*, paragraph 38; *ARG/ Unipart*, paragraph 41; *Eurocheque: Helsinki Agreement*, paragraphs 67-70 and *FRUBO*, page 21. There seems to be a consensus that this definition is normally adopted, see Whish (2003), page 156; Goyder (2003), page 123; Hildebrand (2002), page 245; Jones and Sufrin (2001), page 196; B&C (2001), paragraph 3-050; Ritter, Braun and Rawlinson (2000), pages 124 and 125; Alexander (1973), page 17 and Graupner (1965), page 21.

¹²⁵¹ Commission decision, *Film purchases by German television stations*, paragraph 54, and possibly also Commission decision, *Bayer/ Gist-Brocades*, paragraph 2?

- sometimes the Commission combines these four approaches; and,¹²⁵²
- finally, sometimes the Commission analyses the benefits to society as a whole.¹²⁵³

There is not a clear correlation between the authentic text used in these decisions, i.e. French or English, and the definition of consumers. This could well be because the case teams that analyse these matters are often of mixed nationalities. There is no other obvious justification for these differences either.

Commission, *Article 81(3) Guidelines* attempt to clarify the position, paragraph 84:

"The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of article 81(3) are the customers of the parties to the agreement and subsequent purchasers."

This explains that 'consumers' includes all direct and indirect users of the products covered by the agreement. Some ambiguity remains. Must a fair share of the benefit accrue to the customers of the parties to the agreement *as well as* subsequent purchasers? Apart from the citation above, the guidelines are ambiguous on this point.¹²⁵⁴ However, paragraph 87 reads "The decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers..."¹²⁵⁵ The emphasis on consumers *within each relevant market* might support the idea that each level in the supply chain must benefit.¹²⁵⁶

To sum up so far, the different language versions of this article 81(3) provision introduce ambiguity into the text. This makes interpretation difficult. The Commission has not been consistent in its definition of this provision. The Commission *Article 81(3) Guidelines* seek to impose order. They seem to merge both the French and English language versions of the Treaty.

¹²⁵² Commission decisions, *Rennet*, paragraph 30; *National Sulphuric Acid Association*, paragraph 47; *Rockwell/Iveco*, paragraph 9; *Schlegel*, paragraph 20; *Ivoclar*, paragraph 23; *Rich Products/Jus-rol*, paragraph 42; *BBC Brown Boveri*, paragraph 24; *Cekacan*, paragraph 45 and *GEAE/P&W*, paragraphs 81 and 82.

¹²⁵³ Commission decisions, *Continental/Michelin*, paragraph 27; *KSB/Goulds/Lowara/ITT*, paragraph 27; *Philips-Osram*, paragraph 27; *P&I Clubs*, paragraph 108 and *CECED*, paragraphs 47-57, particularly paragraph 56.

¹²⁵⁴ Also, 'direct and indirect' may either include users of derived products, in our example E, or direct and indirect purchasers of the specific product. Kjølbye (2004), page 575, suggests the latter. The Commission, *Article 81(3) Guidelines* are unclear on this point too.

¹²⁵⁵ See also, Commission, *Article 81(3) Guidelines*, paragraphs 43, 89, 103 and 104.

¹²⁵⁶ Alternatively, it may refer to the situation where the parties themselves supply into different relevant markets? Also note that paragraph 90 states "...if the restrictive effects of an agreement are relatively limited and the efficiencies are substantial it is likely that a fair share of the cost savings will be passed on to consumers." This might imply that we need only look at the parties' customers.

In so doing the Commission may have introduced a twist. 'Consumers' are defined as *all* (direct and indirect) users of the products covered by the agreement. Does this mean that the customers of the parties to the agreement *as well as* subsequent purchasers, including private end-users must *all* (or collectively?) obtain a fair share of the resulting benefit of the agreement? In particular, must a fair share of the agreement's benefits accrue to private end-users? If so, is this the right approach?

What would the Community Courts say? The ECJ has held that the first principal of interpretation is to look at the ordinary meaning of the word in its context and in light of the objectives of the Treaty.¹²⁵⁷ Predicting how the Community Courts will react to the Commission's 'clarification' is particularly difficult because all the language versions of the Treaty are authentic, article 314 of the Treaty. Which should they follow? It cannot be assumed that they will adopt the meaning indicated by the majority of the texts. In *Elefanten Schuh v. Jacqmain*,¹²⁵⁸ the ECJ followed the French and Irish texts of article 18 of the *EC Brussels Convention* and ignored the wording of the Danish, Dutch, English, German and Italian texts. In paragraph 14 of that case the ECJ explained that it had decided to follow the French and Irish texts because they "...were more in keeping with the objectives and spirit of the Convention."¹²⁵⁹

This is the teleological approach to Treaty interpretation so often emphasised by the Community Courts. But does it help us in our case? It will only help us if we can determine what the Community Courts will consider the provision's *telos* to be. In this respect, it may be helpful to analyse the effect that the various interpretations might have on the relevant economic actors.

At first sight, the 'French version' is unsatisfactory. In effect, it means that undertakings operating lower down the manufacturing or distribution chain (than the parties to the agreement) are considered more worthy of surplus than those above them. Why should this be so? In many cases this will simply mean favouring certain companies at the expense of those upstream of them. Interpreting the provision like this seems nonsensical, although this point is discussed further below. Furthermore, it could be extremely difficult and expensive to assess *every* downstream market.

Another approach we saw being used above was to look at the benefits to society as a whole, as opposed to consumers in particular. Jans favours this interpretation, in light of the

¹²⁵⁷ Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982], paragraph 9.

¹²⁵⁸ Case 150/80 *Elefanten Schuh v. Pierre Jacqmain* [1981], paragraphs 12-17.

¹²⁵⁹ The ECJ looks at how many language versions of the Treaty say X, but this is only to support what on other grounds seems the best interpretation, Jacobs (2003), page 304.

environmental policy-linking clause, article 6 of the Treaty.¹²⁶⁰ Monti argues that construing the provision as Jans suggests is problematic:

"Direct consumer benefits, *in addition to societal benefits*, must be established before an exemption is granted."¹²⁶¹

These do not always coincide.¹²⁶²

The Commission has certainly caused a lot of confusion here. Not only has it apparently considered societal benefits under this head in its decisions, its notices also speak of societal benefits here.¹²⁶³ Furthermore, the Commission has actually merged its analysis of article 81(3)'s first and second tests in some of its decisions.¹²⁶⁴

Monti's critique seems to focus on the wording of article 81(3)'s second test. Article 81(3)'s second test merely says that "...consumers [must get] a fair share of the resulting benefit..." It does not state that these must be the consumers of the products in question. Therefore, on a purely (English) textual basis, it is difficult to criticise Jans. However, such an interpretation would be in direct contradiction with the French, Italian, Portuguese and Spanish texts.¹²⁶⁵ These languages all refer to *the users*. This is more specific than the English text and seems to exclude the generalisation of the term to society as a whole.¹²⁶⁶

Vedder distinguishes between economic and non-economic benefits. He argues that:

"Only with regard to the economic benefits of an agreement...is closer scrutiny in the form of the determination of an individual fair share called for. This is inherent in the purpose of the requirement of establishing a fair share for consumers, which...is to ascertain that only

¹²⁶⁰ Jans (2000), pages 280 and 281. Jacobs (1993/2), page 57, discusses a similar concept.

¹²⁶¹ Monti (2002), pages 1076 and 1077. Heimler and Fattori (1998), page 599; Tesauro (1998), page 223 and Evans (1985), pages 103, 104 and 113, agree.

¹²⁶² Bourgoignie (1985), page 7.

¹²⁶³ Commission, *Article 81(3) Guidelines*, paragraph 85 (cited below). True, these comments come after a discussion of consumers, but why are societal benefits mentioned if they are not relevant here?

¹²⁶⁴ Commission decisions, *Visa International - MIE*, paragraphs 74-95 and *CECED*, paragraphs 47-57.

¹²⁶⁵ The French text says "...tout en réservant aux utilisateurs une partie équitable..."; the Italian text says "...pur riservando agli utilizzatori una congrua parte..."; the Portuguese text says "...contanto que aos utilizadores se reserve uma parte equitativa..." and the Spanish text says "...y reserven al mismo tiempo a los usuarios una participación equitativa..."

¹²⁶⁶ Although, relying on the French text, Commentaire Megret (1997), paragraph 222, adopts a similar position to Jans, "...à notre avis, la notion d'utilisateur doit être entendue comme comprenant toute personne autre que les parties à l'entente." This view is based on Commission decision, *P&I Clubs*, where the Commission said that it was not enough that just the parties benefited. However, as we have seen, in that decision the Commission did not look to benefits for society as a whole. As paragraph 41 it said "...it must be shown that persons other than the insured themselves, namely transport users who are their customers, and the final consumers, also benefit from the agreement in question. [my emphasis]" In the same paragraph Commentaire Megret (1997) also seeks to rely on the *Metro I Case*, paragraph 48. But here the ECJ expressly refers to the consumer benefit of improved supplies, which cannot be understood as society as a whole, but rather users.

advantages that not only benefit the parties themselves are exempted. Environmental benefits, by their very nature, cannot be kept for oneself. Economic benefits, on the contrary, may very well not be passed on to consumers."¹²⁶⁷

In many ways this is a similar argument to that of Jans. Vedder adds a kind of teleological point too. He says that, unlike economic ones, non-economic benefits cannot be reserved to the parties. As a result, there is no need to analyse the pass-on of non-economic benefits.

There may be some logic in this position. It is unlikely that article 81(3) was originally designed with non-economic objectives in mind, at least to the scale that they are now included in the Treaty. However, the core of Vedder's point is that the provision is there to ensure that not only the parties benefit from the agreement. But, as we have already seen, the French language version seems to require something more. It is not enough that not only the parties benefit from the agreement, but a specific group (users) must benefit too.

Secondly, the Commission does not distinguish between economic and non-economic benefits when it refers to societal benefits (nor does the Treaty). Indeed, it has expressly referred to societal benefits in relation to economic efficiencies. Commission, *Article 81(3) Guidelines*, paragraph 85, says:

"...society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources."

Furthermore, Vedder's suggestion ignores the fact that consumers need not benefit from every type of benefit, but must just get a fair share of the *overall* benefit, see above. It may be that an agreement generates some economic benefits and a lot of environmental benefits. Where this is the case, and the parties reserve all the economic benefits to themselves, Vedder's method would not be able to assess whether consumers got a fair share. The Commission (implicitly) seems to accept this point. Chapters Four and Eight show it attempting to quantify the *extent* of environmental benefits in Commission decision, *CECED*, for example.¹²⁶⁸

Where consumers are defined as both direct and indirect users, the assessment will have to be made on many markets, especially if users of derived products are also considered. As a result, the group of relevant consumers could become extensive. Perhaps references to examining the overall benefits to society are merely an efficient shorthand for a detailed analysis of consumers on each and every relevant market? Although we prefer the English definition of consumer, to that implied by the French language version of the Treaty, use of this shorthand would sit

¹²⁶⁷ Vedder (2003), page 173.

¹²⁶⁸ In addition, where an agreement only generated non-economic gains, according to Vedder, article 81(3)'s second test would be irrelevant. The Community Courts could read his interpretation into the provision, but I do not think they would readily do so.

comfortably with our desire to avoid a partial equilibrium analysis. Having said that, the Commission has not embraced this definition either. It appears to insist that one assess the overall benefits *on each relevant market*.¹²⁶⁹

So, what alternatives are there? Might it be advantageous to interpret 'consumers' in article 81(3) of the Treaty as private end-users of the goods or services covered by the agreement, in our example G?¹²⁷⁰ This would be in line with, amongst others, the English and German versions of the Treaty.

The Preamble tells us that the essential objective of the Member States' Treaty efforts is "...the constant improvement of the living and working conditions of their peoples..." Article 2 of the Treaty talks of "...the raising of the standard of living and quality of life..." Ensuring that private end-users benefit from anti-competitive agreements would help promote this end.

Other justifications can be found in the Treaty for this approach. The English language version of the Treaty, for example, uses the same word for 'consumer' in article 81(3), as is used in article 153 of the Treaty, in relation to 'consumer protection'. This occurs in other language versions too,¹²⁷¹ although not in all of them.¹²⁷² Could it be that the Danish, English, Finnish, German, Greek and Swedish language versions of the Treaty implicitly carry within them the idea that a 'consumer', as used in article 81(3) of the Treaty, is someone who needs protection? The definition of consumer protection in article 153 of the Treaty is wide enough to include consumers' economic interests. Article 153(1) reads:

"In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety *and economic interests of consumers*, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. [my emphasis]"

Defining 'consumer' in this way would also give weight to article 153(2) of the Treaty:

"Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities."

Interpreting the word 'consumers' in article 81(3) to mean that private end-users should get a fair share of the agreement's resulting benefit could be very appealing to the Commission. Mario Monti has said that this contributes "...to an image of the European Union as a project not only

¹²⁶⁹ Commission, *Article 81(3) Guidelines*, paragraphs 43, 89, 103 and 104.

¹²⁷⁰ We may choose to include within this definition private end-users of derivative products too, in our example E. This is discussed later in the text. In the interim, we do not include these end-users in our definition of consumers.

¹²⁷¹ This is the case in the Danish, English, Finnish, German, Greek and Swedish texts.

¹²⁷² The Dutch, French, Italian, Portuguese and Spanish texts all use a different term in relation to those considered worthy of consumer protection in article 153 of the Treaty.

of politicians, or for the benefit of business, but as a project for the people."¹²⁷³ Indeed, in the same speech, Mario Monti emphasised:

"Our work is easier to understand if the underlying objectives of the competition rules are made clear. These objectives are to ensure wider consumer choice, technological innovation and price competition. This is achieved by ensuring that companies compete rather than collude, that market power is not abused *and that efficiencies are passed on to final consumers*. [my emphasis]"

This interpretation of 'consumer' also receives support from the Community Courts. In relation to article 82, for example, the ECJ differentiates between customers and consumers:

"Article 86 [now article 82] prohibits any abuse by an undertaking of a dominant position...The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its *customers and ultimately of the consumers*. [my emphasis]"¹²⁷⁴

If the second exemption condition is to be read as a consumer protection provision,¹²⁷⁵ we must define exactly who needs protection. It seems sensible to adopt the same concept as that used in relation to 'consumer' in article 153 of the Treaty. Why should the Commission intervene to protect those that do not need protection? This would also provide internal coherence to the Treaty. The concept of 'consumer' under article 153 is a complex notion, but essentially it is a private end-user.¹²⁷⁶

Most of the actors in our example are established companies acting in the course of their business, so they would be unlikely to be considered 'consumers' in this sense. The only exception to this is G, who is a private individual. Therefore, if we interpret 'consumer' in this

¹²⁷³ Mario Monti (2001a).

¹²⁷⁴ Case 85/76 *Hoffmann-La Roche v. Commission* [1979], paragraph 38. See also, Case T-30/89 *Hilti AG v. Commission* [1991], paragraph 90 and Case 27/76 *United Brands Company and United Brands Continental v. Commission* [1978], paragraph 65 and compare with Case 6/72 *Europemballage Corporation and Continental Can Company v. Commission* [1973], paragraph II.3. Thanks to Giorgio Monti for this argument.

In the French version of these judgments the ECJ uses yet another word 'consommateurs'. Also, in the *Pavlov Case* the ECJ refers to *final* consumers (although this may be a literal translation from the French 'utilisateur final'), paragraph 81. This undermines the weight of this point somewhat.

¹²⁷⁵ Monti (2002), pages 1075-1077, suggests that it already is. See also, Commission decision, *VW*, paragraph 189, where the Commission, when discussing the possibility of an individual exemption of an agreement, said that this could not be contemplated. The agreement had not been notified, but the Commission added "The export ban/restriction is in serious contradiction with the objective of consumer protection which article 85(3) [now article 81(3)] makes an integral part of the Community's competition rules."

¹²⁷⁶ See for example, Council Directive, *on unfair terms in consumer contracts* (1993), article 2, which restricts the notion of consumers to natural persons. Although there is not total consistency here, sometimes the definition has been extended to include undertakings acting outside of their main area of competence. For a more detailed discussion of this concept, see Mortelmans and Watson (1996) and Aquaro (2003). Thanks to Giorgio Monti for this point.

way, we must assess whether or not G (and possibly E, if we decide to include consumers of derived products) gets a fair share of the resulting benefit.

One might argue that reliance on article 153 of the Treaty in order to define 'consumer' within article 81(3), is misleading. This is because when the Treaty was adopted in 1957 it did not embrace the concept of consumer protection (which is debatable in itself¹²⁷⁷). Therefore, so the argument goes, we cannot read this concept into the *telos* of article 81(3). However, such an argument misconstrues the Community Courts' teleological approach in any event. Chapter Two explained that this is not a historical-purposive approach. Instead, the Community Courts interpret the Treaty in light of its objectives, *as they see them today*. This too argues in favour of incorporating a consumer protection notion into article 81(3). See, for example, the reference to the Preamble above.

However, inserting the consumer protection notion into article 81(3)'s second provision creates two major problems. First, particularly in horizontal agreements that fall within article 81, the parties will rarely sell directly to 'consumers'. We would need to examine every level of trade between the parties and the consumers to ensure that competition exists there too. If fierce competition does not exist in *all* downstream levels, even if there is perfect competition at the parties' level, then it is unlikely that the surplus that the agreement creates will be passed right down the supply chain. As a result, private end-users may not get a fair share of the benefit. This sort of assessment would be an enormous task.¹²⁷⁸ The result of this test is also unfair on the parties (who cannot normally *ensure* that the benefits go this far downstream¹²⁷⁹) and reduces welfare for society as a whole. This is because, in effect, even agreements in fiercely competitive markets that create large benefits (under article 81(3)'s first test) will likely breach article 81(3) if there is a level of, for example, distribution downstream of the parties where competition is not fierce. This, in turn, will reduce the ability of the parties to compete with their rivals on the merits. It would also undermine the efficient allocation of resources and increase firms' incentives to integrate vertically. Such distorted incentives are probably inefficient and costly to society as a whole.

¹²⁷⁷ Evans (1981), page 425, points out that when the big consumer protection initiative started in the 1970s the Community Institutions "...were quick to point out that the promotion of consumer interests had been implicit in their earlier work, especially the implementation of competition policy."

¹²⁷⁸ In some of its decisions, the Commission implies that it has carried out such an assessment in downstream markets. See, for example, Commission decisions, *SABA*, paragraph 43; *National Sulphuric Acid Association*, paragraph 47; *SABA's EEC distribution system*, page 50; *Yves Rocher*, paragraphs 61 and 62; *Pronuptia*, paragraph 35 and *EBU/ Eurovision*, paragraph 68. The ECJ obliquely refers to such an analysis in the *Metro I Case*, paragraph 47, although it did not impose it as a general requirement in all cases there.

¹²⁷⁹ Commentaire Megret (1997), paragraph 222; Wyatt and Dashwood (1993), page 580 and Evans (1985), pages 101 and 109.

This leads us to the second problem that incorporating a consumer protection notion into article 81(3) creates. Many goods and services do not have consumers, (private end-users), or have very few (as opposed to 'consumers' of derived products). Think, for example, of large commercial aircraft. For such products and services we could either ignore the second article 81(3) provision; or, we could consider the effects on the consumers of the derived products, in our example this was E as well. The latter would be preferable, because the Community Courts will not ignore Treaty provisions lightly. But, if we include these 'derived consumers' then the assessment will rapidly become extremely complex. In reality A and B will sell to hundreds, if not thousands, of customers. There will be millions of derived consumers. It would be very difficult for the decision-maker, and impossible for private parties, to assess whether all these groups of derived consumers got a fair share of the resulting benefit. We could infer the necessary consumer benefits if vigorous competition exists at all levels of production and distribution between the parties to the agreement¹²⁸⁰ and the 'consumers' (derived or not). However, assessing this would still be an enormous task.

The conclusion so far is that there are good reasons, from a political perspective, to interpret 'consumer' within article 81(3) of the Treaty, as a private end-user. This also fits with a contextual reading of the Treaty, taken as a whole. However, refusing exemption unless *private end-users* get a fair share of an agreement's resulting benefit complicates the analysis immensely and may often mean that beneficial agreements (in Community terms) will not be allowed. This is unfair on the parties, as it will undermine their ability to compete on the merits. It also reduces society's welfare. Furthermore, for the reasons outlined below, it may be unnecessary. Interpreting consumers as private end-users was not the only possibility. The French word 'utilisateur' also includes those that buy from the parties to the agreement. Does it make sense to ensure that the parties' customers get a fair share of the resulting benefit? Enforcing competition policy is expensive. We asked above whether the Treaty should seek to ensure that the benefits of the agreement are passed down the manufacturing or distribution chain, normally from one company to another? We said that, at first sight, the answer was no.

In fact, when one considers the issue in more detail and in light of our further discussion, the benefits of a 'refined French approach' become clearer. Imagine that every level of manufacturing and distribution below the parties to the agreement is competitive. Remember too that competitive pressures will normally ensure that cost-savings (or other benefits) are passed on by way of lower prices, etc. This means that as long as we can ensure that a fair share

¹²⁸⁰ Commission, *Vertical Guidelines*, paragraph 136 and Commission, *Horizontal Guidelines*, paragraph 34, which say "Generally the transmission of the benefits to consumers will depend on the intensity of competition on the relevant market. Competitive pressures will normally ensure that cost-savings are passed on by way of lower prices or that companies have an incentive to bring new products to the market as quickly as possible." See also, Commission, *Article 81(3) Guidelines*, paragraph 96.

of the benefits created by the agreement *are passed on to the parties' customers*, then these benefits should be passed on, right down the supply chain, to the private end-users. To the extent that there is not sufficient competition at every level beneath the parties to the agreement, the competition authorities should intervene to improve situations there, rather than outlaw beneficial agreements generated by undertakings competing on the merits.

Pelkmans criticises this suggestion. He believes the provision demands that certain direct benefits, as opposed to merely indirect efficiency ones, be passed on to consumers.¹²⁸¹ However, he does not explain or justify this view. It is hard to understand because article 81(3) does not distinguish between the types of benefits involved; nor do the Community Courts or the Commission, in their application of this provision. Perhaps the idea is similar to that of Evans, when he notes that:

"...while the benefit for intermediaries in the economic process lies in profitability and the benefit for consumers as members of the public lies in the broader notion of consumer satisfaction, the Commission does not appear to recognise such a distinction."¹²⁸²

The private end-user might get consumer satisfaction from, for example, a certain amount of choice in relation to the products in question. This would increase marketing and distribution costs and so, Evans seems to assume, that, for example, it conflicts with the intermediaries' profitability and would be ignored in an assessment of their benefits. However, this need not always be the case. In a competitive market, the intermediaries should be receptive to consumer demand. If consumers value increased choice enough to pay for it then, in theory, the intermediaries would take account of this, and the two concepts would no longer conflict. Pelkmans is right in that direct consumer benefits should *also* be relevant here, but we see no reason why the provision should relate exclusively to them.

As a result, it certainly seems to be *acceptable*, to deem article 81(3)'s second condition to be fulfilled where it can be shown that a fair share of the resulting benefits are passed on to private end-users. However, for the reasons outlined above, it should not be *necessary* to show that this group receive a fair share of the resulting benefit. Where all downstream markets are efficient, we can achieve our consumer protection aim by ensuring that the parties to the agreement pass a fair share of their agreement's benefit on *to their customers*. We do not need to look any further,¹²⁸³ even if they are not private end-users. Even if not all downstream markets are competitive (so that these benefits are not, in fact, passed down to private end-users), then the

¹²⁸¹ Pelkmans (1985), pages 32 and 33. See also Evans (1985), page 109.

¹²⁸² Evans (1985), page 105.

¹²⁸³ Indeed, to look further downstream means that we risk making a false assessment of what benefits have and have not been transferred as a result of the agreement. Remember that it is the *overall* transfer of benefits that is important.

best strategy is to ensure that these markets become competitive. It is not to refuse exemption for an otherwise acceptable agreement in the upstream market.

It is hard to justify article 81(3)'s second test on anything other than consumer protection grounds. We have discussed a practicable mechanism for the assessment of this objective, i.e. the transfer of benefits to the parties' direct customers. In our view, this is how article 81(3)'s second objective should be interpreted.

Consumer protection is an important Treaty objective. It should be considered within article 81.¹²⁸⁴ However, Chapter Two argued that the Commission and the Community Courts have widened the first article 81(3) test to essentially become a public interest balancing exercise. This would likely include consumer protection, particularly in light of article 153(2)'s policy linking clause. The Commission may have already considered it there, see Chapter Four.

Does this mean that we are wrong to interpret the first article 81(3) test in this way? Not necessarily. The first test could include all relevant objectives, excluding consumer protection ones. These could then be considered under article 81(3)'s second test.

The final question we need to ask is whether the second article 81(3) test should be retained. In our view it should not. Retaining the consumer protection requirement should give it more weight in article 81(3).¹²⁸⁵ Imagine an agreement that contributed greatly to, for example, public health, see article 152 of the Treaty, yet offered no consumer benefits. The optimal Treaty balance (even including the lack of consumer protection) might be to allow the agreement. This would be possible if consumer protection fell under article 81(3)'s first test. However, this would not be the case today due to the presence of the second article 81(3) test.¹²⁸⁶

If consumer protection would be given less weight in article 81(3)'s first test's balance than it currently gets under the second article 81(3) test, it implies one of two things. Either consumer protection would not have been given enough weight in the balance; or, the second article 81(3) test over-emphasises its importance today. If the first is true, then the balance needs to be done correctly (and the second provision is irrelevant). If it is the latter, then this second provision

¹²⁸⁴ Also, see the arguments of the Plaintiff, Case 249/85 *Albako Margarinefabrik v. Bundesanstalt für landwirtschaftliche Marktordnung* [1987], page 2348 and Case C-376/92 *Metro SB-Großmärkte v. Cartier* [1994], see the opinion of Advocate-General Tesauro, paragraph 33, "...considerations relating to consumer protection...should not be unconnected with the interpretation of article 85 [now article 81] of the Treaty."

¹²⁸⁵ See, for example, Evans (1981), page 434. Although we have said that this provision is achieved relatively easily, see above, the Commission, *Article 81(3) Guidelines*, seek to make this requirement harder to satisfy.

¹²⁸⁶ The last statement is only true where a fair share is always seen as a positive benefit, as it generally is, see above. One could argue that where, for example, an agreement would generate considerable environmental benefits, it is fair that those that consume pay extra to achieve this, for the benefit of all; although see Evans (1985), page 102, in this regard. Even if this definition of 'fair share' is used, which is not currently the case, see Commission, *Article 81(3) Guidelines*, paragraph 85 and Kjolbye (2004), page 575, then article 81(3)'s second test is still unnecessary, see below.

undermines the optimal balance. The second scenario is increasingly likely. Consumer protection is an important Treaty aim, but it is not the only one, or even necessarily the most important, see Chapter Eight. The Treaty also demands a high level of protection for environmental and public health concerns, for example.

For these reasons, our preferred solution is to remove the second article 81(3) provision demanding that "...consumers a fair share of the resulting benefit..." from the Treaty. This provision might have reflected the optimal Treaty balance in 1957. It does not do so today. The non-economic objectives can best be balanced under article 81(3)'s first test.¹²⁸⁷

4. THE FOURTH ARTICLE 81(3) TEST: DO NOT ELIMINATE COMPETITION (ARTICLE 81(3)(B))

Article 81(3)(b) of the Treaty says that agreements must not:

"...afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

This provision creates a hierarchy, by promoting one objective above all others in article 81(3) analysis, at least to a limited degree. Hierarchy is discussed below. Its presence creates a problem within article 81(3) of the Treaty. In order to understand why, we must first consider what is meant by 'competition' in article 81(3)(b).

What does 'competition' under article 81(3)(b) refer to? Does it, for example, refer to restrictions on economic freedom or economic efficiency? A similar issue arose in Chapter Six, in relation to the definition of 'competition' under article 81(1) of the Treaty. Monti believes that it refers to economic freedom.¹²⁸⁸ Many Commission decisions suggest that Monti might be right.¹²⁸⁹ Another possibility is that when the Treaty refers to 'competition' here, it is referring to the possibility of achieving efficiency gains. One of the clearest examples of this interpretation is Commission decision, *IFPI 'Simulcasting'*. This decision deals with an agreement between collecting societies from all around the world, which facilitated the grant of multi-territorial licences for simulcasting activity. The Commission found that the agreement encouraged competition between record producers' collecting societies, where there had been no competition before. This was because, paragraph 119:

¹²⁸⁷ Politically, it may be difficult to achieve this, as it will likely be seen as a reduction in consumer rights vis-à-vis undertakings. In fact, it should be seen as an enhancement of society's interests.

¹²⁸⁸ Monti (2002), page 1064.

¹²⁸⁹ See Commission decisions, *Rennet*, paragraphs 32 and 33; *Uniform Eurocheques*, paragraph 43; *VIFKA*, paragraphs 21-23; *Dutch Banks*, paragraph 65; *LATA Passenger Agency Programme*, paragraph 63; *LATA Cargo Agency Programme*, paragraph 54; *Assurpol*, paragraph 41; *Schöller Lebensmittel GmbH & Co. KG*, paragraphs 130 and 135 and *Stichting Baksteen*, paragraph 39. Also see, Joined Cases T-185/00, etc. *Métropole Télévision v. Commission*, [2002], paragraphs 63-86.

"The collecting societies will be able to actually compete and to differentiate themselves in terms of efficiency, quality of service and commercial terms."

The Commission continued that the agreement also meant that, after an additional adaptation period, the competition between collecting societies would extend to pricing. At paragraph 120 it said:

"Accordingly, the participating EEA [European Economic Area] societies will have to increase their efficiency as regards their administration costs in such a way as to be able to provide a "one-stop" simulcasting license at the lowest cost possible to EEA users."

In the next paragraph the Commission emphasised that the increased transparency that the agreement would introduce would:

"...allow users (as well as members of the societies) to better assess the efficiency of each of the societies and have a better understanding of their management costs."

In light of these (and other) factors the Commission said that the agreement would not eliminate competition for the purposes of article 81(3)(b) of the Treaty. Prior to this decision, the Commission had not been so explicit in its language. That said, there is certainly the implication in many other cases, decisions and communications, that the word 'competition', as used in article 81(3)(b) of the Treaty, refers to efficiency gains.¹²⁹⁰

Commission, *Article 81(3) Guidelines*, paragraph 105, are even more confusing:

"Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of article 81 is to protect the competitive

¹²⁹⁰ See, for example, Commission decisions, *Bayerische Motoren Werke AG*, paragraph 31; *SABA*, paragraphs 47-50; *Bayer/ Gist-Brocades*, paragraph 4; *United Reprocessors GmbH*, paragraph 4; *KEWA*, paragraph 4; *Junghans*, paragraph 37; *De Laval - Stork*, paragraph 12; *Beecham/ Parke, Davis*, paragraph 45; *Langenscheidt/ Hachette*, paragraph 23; *Amersham Buchler*, paragraph 14; *Rockwell/ Iveco*, paragraph 11; *Nuovo CEGAM*, paragraph 25; *Synthetic Fibres*, paragraphs 48-52; *Grundig's EEC distribution system*, pages 6 and 7; *Optical Fibres*, paragraphs 73-80; the *Metro II Case*, paragraphs 40-47; *ENI/ Montedison*, paragraphs 39-41; *Yves Rocher*, paragraphs 64 and 65; *Boussois/ Interpane*, paragraph 20; *Enichem/ ICI*, paragraphs 46-50; *Olivetti/ Canon*, paragraph 58; *Bayer/ BP Chemicals*, paragraphs 38-41; *IVECO/ FORD*, paragraphs 37-40; *BBC Brown Boveri*, paragraph 33; *Charles Jourdan*, paragraph 42; *UIP*, paragraphs 56-59; *Alcatel Espace/ ANT Nachrichtentechnik*, paragraph 21; Commission, *RCP 1991*, page 42; *Yves Saint Laurent Parfums*, page 34; *Parfums Givenchy system of selective distribution*, pages 21 and 22; *Ford/ Volkswagen*, paragraphs 37 and 38; the *Matra Case*, paragraphs 150-156, although note paragraph 155; Commission, *RCP 1993*, paragraph 85(iv); *Exxon/ Shell*, paragraphs 79-82; *Pasteur Mérieux-Merck*, paragraphs 95-101, 103, 110 and 113; *Olivetti-Digital*, paragraph 33; *Fujitsu AMD Semiconductor*, paragraph 45; *Atlas*, paragraphs 59-74; *Pheonix/ GlobalOne*, paragraphs 65-72; *Unisource*, paragraphs 94-101; *Uniwold*, paragraphs 83-85; *Van den Bergh Foods Limited*, paragraphs 242-246; *Sicasov*, paragraph 77; *TPS*, paragraphs 135-138; *P&I Clubs (1999)*, paragraphs 113-115; *P&O Stena Line*, paragraphs 67-130 and 135; *REIMS II*, paragraph 90; *British Interactive Broadcasting/ Open*, paragraphs 168-186; Faull and Nikpay (1999), paragraphs 2.169-2.172; *Eurovision (2000)*, paragraphs 100-105; *SAS Maersk Air*, paragraph 77(d); *DSD and Others*, paragraphs 158-163, although there is a hint of economic freedom in paragraphs 159 and 163; and, Commission, *Horizontal Guidelines*, paragraph 134.

process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming *inter alia* from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices."

This paragraph says the ultimate aim of article 81 is protection of the competitive process. This seems to refer to the concept of economic freedom. However, this ultimate objective does not properly reflect the interpretation of article 81 in a Treaty context, see Chapter Two. Furthermore, if the Commission is discussing economic freedom here, it is used because such rivalry is "...an essential driver of economic efficiency..." does this mean that economic efficiency is the ultimate aim? This is confusing because, as Chapter Six showed, economic freedom and economic efficiency do not always coincide.

In conclusion, there is a lack of consistency from the Commission. Sometimes it interprets article 81(3)(b) as referring to economic freedom, at other times efficiency. The Commission, *Article 81(3) Guidelines* do not help either. Nor have the Community Courts clarified the matter. Their judgments do not contain clear and consistent statements on this issue. The only point that can be made with any certainty is that article 81(3)(b) probably refers to either efficiency considerations or economic freedom and nothing else.¹²⁹¹

This has an important implication. In order to explain why, we must return to what the Commission is doing when it performs the balance in article 81(3)'s first test. Where a restriction of competition has been demonstrated then the assessment moves to article 81(3) of the Treaty. We have seen that the relevant factors under article 81(3)'s first provision (i.e. the relevant objective benefits produced by the agreement) are balanced against the restriction of competition under article 81(1) of the Treaty, see above. In the words of the ECJ, the:

"...improvement [under article 81(3)'s first test] must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition [article 81(1)]."¹²⁹²

Chapter Six argued above that 'restriction of competition' should be interpreted in terms of economic efficiency considerations. Others, such as Monti, see Chapter Six, thought that it relates to economic freedom. Despite this disagreement, we both agree that both of these objectives could be considered relevant in a particular case. We just disagree about where, in article 81(1), or in article 81(3)'s first condition. So, we agree that economic freedom and economic efficiency, where relevant, are balanced when the restriction of competition under

¹²⁹¹ That is not to say that these concepts are not affected by other relevant objectives, see Vedder (2003), pages 181-185; Jans (2000), pages 283 and 284 and Bouterse (1994), pages 22-25 and 122-125.

¹²⁹² The *Consten and Grundig* Case, page 348.

article 81(1) is weighed against article 81(3)'s first condition.¹²⁹³ In addition, we have just seen that one, or possibly both, of them (economic freedom and/ or efficiencies) are also considered in the fourth article 81(3) test. There they are placed in a hierarchy, at least to a limited extent. These two tests (balancing and hierarchy) are either unnecessary or inconsistent. Why?

We examine the 'unnecessary' point first. Article 81(3)(b) is unnecessary when the agreement 'fails' the first article 81(3) test.¹²⁹⁴ Imagine that the relevant decision-maker, for example, the Commission, weighs (amongst other things) economic freedom and efficiency in article 81(3)'s first test's balance. If it decides that the restriction on economic efficiency is not outweighed by the improvement to economic freedom generated by the agreement,¹²⁹⁵ then the fourth article 81(3) provision is irrelevant. This is because the article 81(3) tests are cumulative, see the introduction. It has already been decided that the restriction of competition is not justified and so the fourth provision adds nothing.

While it is true that, substantively, the fourth test adds nothing in this situation, there may be a *procedural* benefit to retaining it. The balancing exercise which must be undertaken within article 81(3)'s first test is complex and expensive.¹²⁹⁶ The 'elimination of competition' test is relatively simple (and cheap) to apply.¹²⁹⁷ As long as it accurately reflects the outer limits of the balancing exercise,¹²⁹⁸ retention of the article 81(3)(b) test could still be beneficial as a kind of quick 'first check'. If the agreement failed here, the expense of article 81(3)'s first test could be avoided. We return to this issue below.

The last two paragraphs have discussed the case where the agreement would fail both article 81(3)'s first and fourth tests. We suggested that, in this instance, article 81(3)(b) is irrelevant, from a substantive perspective. Despite this, it might have a procedural value as a quick first check, as long as it properly defined the outer limits of the first test's balance. This introduces the second issue referred to above, that of the possible inconsistency of these two tests.

¹²⁹³ Chapters Three and Four and Section 2 argued that other objectives may be relevant, depending on the facts of the case. Whether or not they are considered is irrelevant to this point.

¹²⁹⁴ We need only consider the occasions when agreements eliminate competition. If they do not, then article 81(3)(b) of the Treaty is irrelevant because it does not change the analysis, in that it does not prevent exemption.

¹²⁹⁵ For the purposes of this argument it is assumed that 'competition' means economic efficiency, but the argument is the same if it is interpreted as economic freedom.

¹²⁹⁶ The expense, complexity and lack of predictability of this process dramatically increase when many other objectives are considered, as we argued should take place in Section 2 and Chapter Six.

¹²⁹⁷ There are difficulties with it due to the definition of the relevant market, etc. Nevertheless, it is simpler, cheaper and more predictable than a general balancing test.

¹²⁹⁸ Even if this were not always the case, if it were nearly always so, such a per se rule might still be beneficial, see Chapter Six.

What do we mean by inconsistency? Imagine that, in the context of a specific agreement, it is considered worth restricting competition (economic efficiency) in order to achieve the promised economic freedom (or other) gains. Article 81(3)'s first test establishes this. Furthermore, imagine that the prospective benefits were believed so important that application of the balance under this first test justified the elimination of competition. Even if we were to decide this, then the agreement could not be exempted because it would 'fail' article 81(3)(b). In other words, the fourth provision would undermine the assessment of the 'optimal' article 81(1)/(3) balance in the first test.

An inconsistency can arise between article 81(3)'s first and fourth tests. It must be stressed again that this is not because article 81(3)'s first test has become a general balance.¹²⁹⁹ Only three factors are needed for inconsistency to arise:

- 'competition' under article 81(1) and 81(3) of the Treaty must have the same meaning;
- the factors in article 81(1) and those considered under article 81(3)'s first test must be balanced against each other; and
- the outcome of article 81(3)'s first test's balance (as applied by the decision-maker) must justify the elimination of competition.

The first two points are relatively uncontroversial. First, 'competition' must have the same meaning in both article 81(1) and 81(3)(b) of the Treaty. Or, more generally put, the resulting elimination of 'competition' (as defined under article 81(3)(b) of the Treaty) must already have been considered within article 81(3)'s first test.¹³⁰⁰ This is uncontroversial.¹³⁰¹ Secondly, Chapter Two also showed that the Commission and the Community Courts have embraced a test where the factors in article 81(1) and those considered under article 81(3)'s first test are balanced against each other. In our view, they are right to do so, particularly in light of the increasing importance of non-competition objectives within the Community legal order.¹³⁰²

The final point which is necessary to establish inconsistency was that the outcome of the balance (as applied by the decision-maker) must be that the objective introduced under article

¹²⁹⁹ Although, theoretically, inconsistency might be more likely where more factors are considered in article 81(3)'s first test, such that those considered in article 81(1) are more readily outweighed.

¹³⁰⁰ This would most likely occur because 'competition' has the same meaning within article 81(1) of the Treaty. It would be unusual to interpret the same word in the same article in a different way.

¹³⁰¹ See, for example, Commission, *Horizontal Guidelines*, paragraphs 36, 71, 105, 134, 155, 174, 175 and 197 and Hildebrand (2002), page 247.

¹³⁰² Chapter Two explained that while the first article 81(3) test *allowed* for a balancing process it does not *demand* one. It merely asks that there be some contribution to improving the production or distribution of goods, etc. If this balancing exercise were omitted then article 81(3)(b) would be left as the sole method of resolving conflicts between restrictions of competition and the objectives pursued by article 81(3)'s first provision. Seen in this light, article 81(3)(b) has a relevance.

81(3)'s first test justifies the elimination of competition. This would be inconsistent with article 81(3)(b) of the Treaty. Such an outcome could (theoretically) occur for two reasons:

- because the decision-maker did not perform the article 81(1)/(3) balance correctly. This might occur if the decision-maker misunderstood the optimal balance, which, *in fact*, so the argument goes, would *never* justify the elimination of competition; or,
- because the decision-maker achieves the 'optimal' article 81(1)/(3) balance (under the first test), but that article 81(3)(b) does not reflect this balance.

Let's examine these points in turn.

The first suggestion (which we disagree with) about why the decision-maker might not have performed the article 81(3)'s first balance correctly is because he or she misunderstands the optimal balance. Imagine that, in the Community legal order, competition were considered so important that it should *never be eliminated*. If the decision-maker did not understand this then he or she might (wrongly according to this theory) believe that in the particular case at hand, an important environmental or efficiency benefit, for example, would justify the restriction (in this case elimination) of competition. As a result, he or she would say that the agreement passed the first article 81(3) test, but would be brought up short by the fourth test. This is an argument about *never*.

Some believe that, in the Community legal order, it is *never* in the public interest to eliminate competition. Take Bourgeois and Demaret, for example. They view the 'elimination of competition' test as the outer limit of Community action.¹³⁰³ They justify this by citing article 81(3)(b), the ECJ's article 82 judgment in *Continental Can*¹³⁰⁴ and article 2(2) of the Merger Regulation. They add:

"We submit that the principle according to which competition may not be eliminated in respect of a substantial part of the relevant market is to be viewed as a general principle of Community law and that, as such, it ought to bind Community institutions not only when they apply the competition provisions of the EC Treaty, but also when they take measures implementing other policies."¹³⁰⁵

Bourgeois and Demaret acknowledge that this implies the primacy of the competition rules.¹³⁰⁶

¹³⁰³ Bourgeois and Demaret (1995), pages 84-86.

¹³⁰⁴ *Case 6/72 Europemballage Corporation and Continental Can Company v. Commission* [1973], paragraph 24, "...if article 3(f) [now article 3(1)(g)] provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless."

¹³⁰⁵ Bourgeois and Demaret (1995), page 84.

¹³⁰⁶ Bourgeois and Demaret (1995), page 85.

Chapters Two and Four argued that the Treaty does not permanently prioritise any Treaty objective. It may *normally* be the case that it is not in the public interest to eliminate competition. However, there are times, within the Community legal order, when the optimal balance might demand that competition be eliminated.

Bourgeois and Demaret cite three areas of competition policy where the approach they suggest has been favoured, they provide no example from without this policy area. Their idea that a 'competition cannot be eliminated' rule is a general principle of law is not taken up by major textbooks.¹³⁰⁷ There is not even a policy-linking clause for competition.

Their argument is further weakened because the Treaty allows for the elimination of competition, as it is understood under article 81(3)(b) of the Treaty. In some cases the ECJ has said that environmental considerations must be made *without reference to economic considerations*.¹³⁰⁸ Furthermore, competition can be eliminated even within the area of competition policy. Gyselen illustrates this, for example, in his discussion of the *VOTOB Case*. He shows that a situation which was seen to eliminate competition, for the purposes of article 81(3)(b) of the Treaty, was allowed under the State aid provisions.¹³⁰⁹

In addition, if article 81(3)'s first test is meant to be a balance that would never eliminate competition, then article 81(3)(b) of the Treaty would have no function.

Finally, on a practical level, while it may be true that it is not normally beneficial to eliminate competition, in practice, the Commission has sometimes 'ignored' article 81(3)(b) of the Treaty, where it thought that it might undermine the optimal Treaty balance. Bourgeois and Demaret do not even discuss these decisions, which imply that, at least in the Commission's view, these two article 81(3) tests do not always coincide. Whish writes:

"In some cases the Commission has not paid a great deal of attention to this head of article 81(3)...because it has already clocked up sufficient merit marks under the other heads to qualify for lenient treatment under this one."¹³¹⁰

It is not even clear how the Community Courts define 'competition' in this provision. So how can the Commission ensure that it is not eliminated? In any event, not much weight is given to

¹³⁰⁷ There is no mention of it in, for example, Arnall, Dashwood, Ross and Wyatt (2000) and Craig and de Búrca (1998).

¹³⁰⁸ See, for example, Case C-44/95 *R v. Secretary of State for the Environment, ex parte RSPB* [1996], in relation to Council Directive, *on the conservation of natural habitats* and Council Directive, *on the conservation of wild birds*; and, Case C-371/98 *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex parte FCS* [2000].

¹³⁰⁹ Gyselen (1994), pages 250-252 and 257.

¹³¹⁰ Whish (2003), page 159. See also, Hildebrand (2002), page 247 and Faull and Nikpay (1999), paragraph 2.170, "Commission decisions have not always given this condition as much consideration as some of the other conditions of article 81(3)." Although Faull and Nikpay add that this is an important condition.

article 81(3)(b). The Council has promulgated at least one block exemption that encourages horizontal price-fixing cartels in the liner shipping industry.¹³¹¹ The result is that competition is as good as eliminated on many trades.¹³¹² This is an extreme case, but the Commission has watered down the test too. For example, it has said:

"The last criterion of elimination of competition for a substantial part of the products in question is related to the question of dominance. Where an undertaking is dominant or becoming dominant as a consequence of the vertical agreement, a vertical restraint that has appreciable anti-competitive effects can in principle not be exempted. The vertical agreement may however fall outside article 81(1) if there is an objective justification, for instance if it is necessary for the protection of relationship-specific investments or for the transfer of substantial know-how without which the supply or purchase of certain goods or services would not take place."¹³¹³

There are other examples. The agreement considered in Commission decision, *United Reprocessors GmbH*, for example, almost completely eliminated competition in the short and medium term. At paragraph 4 the Commission said:

"Admittedly, during a transitional period (which does have a fixed date of expiry) URG's only competitors in the common market will be three small-scale reprocessing units...two of which are either shut down or are being used for reprocessing non-oxide nuclear fuels; from 1978 it might possibly have to compete with the new Eurochemic plant - a relatively small one - and later still with Eurex II...

However, the eventual creation of effective competition is both one of the aims of the agreement and one of the conditions imposed by the Commission *once the objective requirements, i.e., adequate load factors, are met*, a time limit also being fixed. Accordingly, the undertakings concerned are faced with the certainty of becoming competitors at that time, which obliges them to behave from now on bearing this in view..." [my emphasis]¹³¹⁴

In this decision, the Commission accepted that competition would essentially be eliminated in the short and medium term. In order to justify exemption, it relied on the fact that the parties would compete against each other once adequate load factors were met as well as the power of their customers.¹³¹⁵ This would be in fifteen years time, at the earliest. This is quite a long time for the two undertakings, in their regular (and now legal) meetings, to construct a sophisticated

¹³¹¹ See, for example, Council Regulation, *Shipping Cartels*.

¹³¹² See Townley (2004).

¹³¹³ Commission, *Vertical Guidelines*, paragraph 135. See also Commission, *Horizontal Guidelines*, paragraphs 36, 71, 105, 134 and 155. The Commission has tried to massage these statements in Commission, *Article 81(3) Guidelines*, paragraph 106. My thanks to Giorgio Monti for this point.

¹³¹⁴ A similar position emerged in Commission decisions, *KEWA*, paragraph 4, where the Commission found that competition would probably be eliminated for 10 years, although it thought that it would be restored after that; and *EPI code of conduct*, paragraph 46. It must be said that sometimes the Commission has taken the issue of eliminating competition more seriously, see Commission decision, *AuA/ LH*, paragraphs 96-104 and Whish (2003), page 160.

¹³¹⁵ Commission, *RCP 1975*, pages 43 and 44.

collusion strategy. The result of this sort of decision-making can be that the Commission substitutes its judgment, for that of the market.¹³¹⁶

The Community Courts and the Commission have emphasised the importance of competition. However, it does not seem to be a general (and absolute) principle of Community law that competition can *never* be eliminated. Furthermore, both the Commission and the Council have, on occasion, allowed competition to be effectively eliminated where to do otherwise would undermine what they saw as the optimal Treaty balance. This supports our argument that there are times (however few) when the elimination of competition is appropriate in the public interest. This means that our first (theoretical) possibility can be ignored. The public interest, as assessed under article 81(3)'s first test, does not dictate that competition can never be eliminated.

Even if we were wrong in this regard, the best solution would be to ensure that the decision-maker applies article 81(3)'s first test appropriately.¹³¹⁷ The Commission does not always achieve a consistent balance here, or make sufficient effort to explain how these different objectives interact. Nor has it outlined a coherent balancing method. This is particularly important now that many actors can apply article 81(3) of the Treaty. Commission, *Article 81(3) Guidelines* help in this regard, although they do not properly deal with the specific problems raised by non-economic objectives. Chapter Eight provides a framework for this. The Community Courts should ensure that the Commission is more rigorous in its implementation of the balance, both its theoretical underpinnings, as well as assessing the balance itself. Once the balance under article 81(3)'s first test were correctly applied, article 81(3)(b) would be irrelevant.

Let's consider our conclusions so far. The argument is that the presence of both article 81(3)'s first and fourth tests is either unnecessary or inconsistent. We showed that when the agreement 'fails' the first test, then there is no need for the fourth test, because all four tests are cumulative. We did suggest that there might be procedural reasons for retaining article 81(3)(b) however, as long as this accurately reflected the outer limits of the balance. We also argued that when the optimal balance under the first test justified the elimination of competition then the presence of the fourth test, undermines this assessment. In this scenario, article 81(3)(b) is inconsistent with the public interest. We suggested two reasons why such a conflict might occur. Some believe that the balancing exercise under article 81(3)'s first test could never permit the elimination of competition. We argued that, in fact, this is wrong, but even if this is the case, it simply

¹³¹⁶ Amato (1997), pages 62 and 114 and Wesseling (2000), page 39.

¹³¹⁷ We have just seen that article 81(3)(b) of the Treaty is not always an effective check in any event.

confirms that article 81(3)(b) is irrelevant here too, as such an assessment should have been made under the first article 81(3) test.

The decision-maker might find that the first article 81(3) balance justifies the elimination of competition. This would conflict with article 81(3)(b) of the Treaty. We have just discussed one possible reason for this, that the decision-maker would have incorrectly assessed the first test. This test (the public interest), so the argument goes, could *never* justify the elimination of competition. We argued that this was not correct. As a result, we must conclude that the article 81(3)(b) test does not (always) reflect the public interest.

Article 81(3)(b) of the Treaty may promote competition too highly. In other words, it may not accurately reflect the balance that the Commission (or other decision-maker) considers appropriate under article 81(3). When the decision-maker decides the optimal balance there, it should consider whether or not the objective benefits justify the elimination of competition in respect of a substantial part of the products in question.¹³¹⁸ Presumably it would not decide this very often, but if it did then should the decision-maker be undermined by article 81(3)(b)?

Assume that, in a particular case, the 'optimal balance' under the Treaty, as established under article 81(3)'s first test, indicates that competition would better be eliminated. It might still be the case that the 'optimal balance' *in relation to agreements between undertakings* should not eliminate competition. Agreements which eliminate competition in respect of a substantial part of the products in question significantly undermine the free market mechanism. One could say that agreements between undertakings should not completely undermine this important mechanism. The ECJ has said this many times. In both the *Metro I* and the *Metro II Cases*,¹³¹⁹ for example, the ECJ held:

"The powers conferred upon the Commission under article 85(3) [now article 81(3)] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market."¹³²⁰

Such a rule seems like a major limit. This is probably not the case. First, agreements that eliminated competition would rarely fit the optimal balance under article 81(3)'s first test. Secondly, as this is only the hierarchy in article 81, it is open to the institutions of the European

¹³¹⁸ In other words, one could argue that there is no need for a separate article 81(3)(b) test.

¹³¹⁹ Paragraphs 21 and 65, respectively. See also, the citation above of Case 6/72 *Europemballage Corporation and Continental Can Company v. Commission* [1973], paragraph 24.

¹³²⁰ The Commission made the same point in a different way in the *VBVB/VBBB Case*, when it said, at page 39, that there "...are no grounds for attributing to the cultural factor any absolute priority over the rules of competition." Advocate-General Verloren van Themaat concurred, page 89.

Union (and the Member States) to legislate in favour of the other objectives if they deem it necessary. In other words, article 81(3)(b) does not lead to a permanent priority for competition throughout the whole Community legal order, we have already argued that it does not encapsulate a general principle of law. Furthermore, such a statement sends out a clear statement to undertakings about the importance of competition in the Common Market.

However, in our view, this suggestion does not hold up to closer scrutiny. First, on a point of principle, there is no *a priori* reason why publicly imposed regulations should automatically be entitled to deference while privately imposed ones are treated with suspicion.¹³²¹ Secondly, when applying article 81, the decision-maker must take account of all the circumstances of the case. As a result, one of the considerations in article 81(3)'s first test should be whether it is appropriate to eliminate competition in an agreement between undertakings. In addition, it seems wrong, in principle, to permanently promote one objective over all others in this fashion. There must surely be some instances, if competition were to clash with a fundamental human right, for example, where its elimination would be acceptable.¹³²² The ECJ's judgments, cited above, counter this view, but perhaps that is because of the existence of article 81(3)(b) of the Treaty. If it were removed, would the Community Courts say the same?

As we have said above, Member States could still legislate here.¹³²³ However, as Gyselen convincingly argues, competition should be neutral vis-à-vis the regulatory or legislative techniques which the State authorities choose to pursue, for example, their environmental policy:

"These choices ultimately reflect the conception these authorities have of a certain type of society. Some States have a regulatory tradition; others favour a more deregulatory approach. The former will have their regulations scrutinised under the Treaty provisions concerning the free movement of goods (article 30 [now article 28] and following). The latter will have their market-based instruments examined under the Treaty competition provisions: article 85 [now article 81], article 85 in combination with article 3(f) and article 5(2) or article 92 [now articles 3(1)(g), 10 and 87]. It is not for the Commission to interfere with choices of regulatory or legislative techniques at State level."¹³²⁴

The provisions just named should have the same legality standard. This is undermined because an equivalent to article 81(3)(b) of the Treaty is not present in these other provisions.¹³²⁵

¹³²¹ Forrester (2005) DRAFT, page 18.

¹³²² Komninos (2005) DRAFT, page 3, article 81(3)(b) "...means that an agreement creating a monopoly, although socially desirable because of accruing efficiencies, will still be prohibited."

¹³²³ Möschel (1991), page 12.

¹³²⁴ Gyselen (1994), page 245. See also, pages 246 and 257.

¹³²⁵ Attachment to article 81(3)(b) of the Treaty more directly affects Member States' regulatory policy choices through a combination of articles 3(1)(g), 10 and 81 of the Treaty.

In conclusion, competition is an important Treaty objective. It is rarely in the public interest for this to be eliminated. As a result, article 81(3)(b) of the Treaty could have a role, in providing a first quick check when exemption is being considered. Where an agreement eliminates competition it is unlikely that it will pass the first article 81(3) test either. Article 81(3)(b)'s presence in such cases would make the proceedings cheaper, easier and more predictable than a general balance. Having said that, in our view, in the Community legal order, competition is not so important as to permanently 'beat' all other relevant objectives. To invoke a special rule in relation to agreements between undertakings may have made sense in 1957. However, today the Treaty is a much more complex document. Many objectives are relevant that were not envisaged in the Community's early days. Some of these, such as human rights, public health and environmental protection have a lot of weight. The presence of article 81(3)(b) of the Treaty can undermine the public interest. It does this at a time when undertakings are being encouraged to act in these non-economic areas. Article 81(3)(b) also undermines the idea that the Treaty should be neutral vis-à-vis the regulatory or legislative techniques which the State (or Community) authorities choose to pursue. It might even force the Community to use legislative or regulatory techniques that are not as efficient for achieving the public interest as agreements between undertakings.

Competition's importance can be adequately protected within article 81(3)'s first balance. Article 81(3)(b) of the Treaty is either unnecessary or inconsistent with the public interest and should be removed from the Treaty. Having said that, we appreciate the need for simplifying the decision-making process. Article 81(3)(b) might be reflected within the first article 81(3) test by creating a rebuttable presumption that where competition were eliminated no exemption would be possible.

5. THE THIRD ARTICLE 81(3) TEST: INDISPENSABILITY (ARTICLE 81(3)(A))

Consideration of many Community and Member State interests is necessary within article 81 of the Treaty. We believe that the best place for this is article 81(3)'s first test. The fact that all relevant objectives can be openly considered there means that other provisions and definitions within article 81 are less likely to be distorted. This should lead to a more open and transparent application of the provision.

Nevertheless, such a wide balancing test in article 81(3) of the Treaty demands an extensive and complex analysis. It also provides ample scope for fundamentally undermining the market mechanism (depending upon how much 'weight' competition is given in the balance). While this possibility reflects the balance advocated within the Treaty, we have already examined two article 81(3) provisions that seem designed to limit the influence of the possibility of exemption.

From what we have seen so far, these limits are far from those advocated by our theoretical conclusion in Chapter One. There we said:

"Ignoring non-economic policy objectives when applying competition law can create significant benefits, in terms of enhanced legal certainty. This encourages firms to invest and innovate. That said, at a certain point the benefits that enhanced legal certainty brings are outweighed by the importance of the policy goals it undermines. Even then, it may still be better to focus on a pure welfare test in competition policy if these non-welfare objectives can be adequately protected through other legislative tools."

We arrived at these conclusions in a legal vacuum. They did not take account of the various demands that the Treaty's structure or provisions make about the consideration of non-economic objectives within article 81. Having said that, they obviously impact upon our approach to article 81 analysis and we wondered whether there might be a justification for introducing an equivalent concept there.

Section 5 analyses the final article 81(3) 'limit', the 'indispensability test'. This test is set out in article 81(3)(a) of the Treaty, which says that agreement must not:

"...impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives¹³²⁶..."

In our view, this provision could be used to achieve the ends we seek. It is important, because, without such a provision, many Treaty articles would, in practice, end up being indistinguishable from each other. Chapter Two argued that many Treaty objectives should be balanced in some of these provisions. But the indispensability test reminds us that although non-economic objectives can be weighed within article 81(3), competition can only be undermined where this is indispensable. In other words, article 81(3)(a) underlines that article 81 is principally about the competitive process.

Article 81(3)(a) of the Treaty embodies a three stage process. As a preliminary step, there must be a balancing exercise to assess which combination of objectives should be achieved by the agreement in question, this is discussed above.¹³²⁷ Then the decision-maker must ensure that:

"First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies."¹³²⁸

¹³²⁶ "...these objectives..." refers back to article 81(3)'s four heads of exemption, see T-66/89 *Publishers Association v. Commission* [1992], paragraph 73 and Faull and Nikpay (1999), paragraph 2.165.

¹³²⁷ The system of this paragraph is somewhat strained if the balancing up is carried out again in the context of the first negative condition of article 81(3) of the Treaty, see the opinion of Advocate-General Verloren van Themaat, the *VBVB/VBBB Case*, page 88.

¹³²⁸ Commission, *Article 81(3) Guidelines*, paragraph 73.

The indispensability test does not only apply to restrictions necessary in order to achieve efficiencies. Those needed in order to achieve non-economic objectives are relevant as well.¹³²⁹

There is general agreement that the article 81(3)(a) test ensures that the agreement is indispensable, in the sense that without it *the parties* could not have attained the relevant objectives.¹³³⁰ See, for example, the *Matra Case*, where the CFI held that the central question under article 81(3)(a) of the Treaty:

"...is whether the joint venture is strictly indispensable to enable *the founders* to penetrate the market in question. [my emphasis]"¹³³¹

However, article 81(3)(a) of the Treaty could equally have generated a different enquiry. On the condition that Chapter Six's recommendations for article 81(1) are accepted, the inclusion of the indispensability test in article 81(3) of the Treaty allows us to ensure that intervention is as successful as possible, while at the same time reducing (presumably consumer) welfare losses to the bare minimum.

The economic theory of optimal intervention says that one can rank the efficiency of different policy instruments, according to the end to be achieved, Chapter One. When we consider whether or not a restriction of competition is indispensable to achieve a balanced set of policy objectives, we could take the theory of optimal intervention into account. The need to achieve Treaty ends through the best means, taking account of the costs of each 'solution', has been accepted by the Commission.¹³³²

In other words, the relevant decision-maker, and ultimately the Community Courts, should only exempt restrictions of competition under article 81(3) of the Treaty when they are convinced that there is no other method which:

- is at least as effective for achieving the balance achieved by the agreement; and,
- does not reduce welfare less than the agreement.

¹³²⁹ Vedder (2003), pages 178 and 179; the *VOTOB* matter, Commission, *RCP 1992*, paragraphs 177-186 and Jacobs (1993/2), page 57.

¹³³⁰ See, for example, van Gerven (2004), page 431; Commission, *Article 81(3) Guidelines*, paragraphs 75 and 76; Vedder (2003), pages 175-181 and Faull and Nikpay (1999), paragraph 2.168.

¹³³¹ The *Matra Case*, paragraph 138. See also, the Opinion of Advocate-General Roemer in the *Consten and Grundig Case*, pages 374-377; Case 71/74, *Nederlandse Vereniging voor de Fruit v. Commission* [1975], paragraph 42 and Commission decisions, *Duro-Dyne - Europair*, page 13; *Goodyear Italiana - Euram*, paragraph 13; *Grundig's EC distribution system*, paragraph 38; *Enichem/ ICI*, paragraphs 40-45; *Atlas*, paragraph 56; *Exxon/ Shell*, paragraph 72; *Pheonix/ GlobalOne*, paragraph 61.

¹³³² SEC(92) 1986a, pages 9 and 10.

Some Commission decisions hint that this has sometimes been the test applied. For example, Commission decision, *Aluminium imports from Eastern Europe*,¹³³³ dealt with an agreement to reduce imports of aluminium into the Community. In relation to whether or not the restrictions were indispensable the Commission said:

"Even if the protection of the western aluminium market from competitive perturbation were accepted as an improvement in production or distribution, or contributed to economic progress, the Brandeis arrangements [the agreements that the Commission was considering] were not indispensable for the achievement of that purpose.

If EEC producers of aluminium had needed any protection from the competition offered by aluminium producers in eastern Europe, their proper course would have been to make an application to the public authorities entrusted by law with the regulation of trade."

Furthermore, in a Press Release relating to book pricing agreements between publishers and booksellers in Germany and Austria the Commission said, in relation to a book-pricing scheme it had sent a statement of objections on:

"The Commission takes the view that alternative mechanisms are available which are a great deal less objectionable from the point of view of competition policy: publishers and booksellers could contribute to a fund to support more demanding literary works; targeted and selective direct aid could be given; discounts could be quality-based rather than quantity-based; or indeed there could be a selective distribution system designed to encourage works with a strong cultural element."¹³³⁴

Note that this kind of a test is fundamentally different to the other 'limits', which are to be found within article 81(3) of the Treaty. Those tests affected the balance achieved under article 81(3)'s first test. Our interpretation of article 81(3)(a) is completely different because it places a *procedural* limit on the use of the article 81(3) exemption. Thus, it does not deny the importance of the various Community and Member State objectives. Instead, it encourages all relevant actors to achieve these ends in as efficient a way as possible.

Note too, that this proposal is not denying the role of undertakings in the achievement of non-economic objectives. The Commission has said:¹³³⁵

"The Commission also takes the view that it is not for undertakings or associations of undertakings to conclude agreements on cultural questions, which are principally a matter for government (although the Commission recognizes that undertakings can also play a valuable part in the dissemination of culture). The Commission is sure that the Member

¹³³³ Commission decision, *Aluminium imports from Eastern Europe*, section 16.2.3. See also similar arguments in, Commission decisions, *United Reprocessors GmbH*, paragraph III(3); *Grohe's distribution system*, paragraph 24; *Ideal-Standard's distribution system*, paragraph 24; *Uniform Eurocheques*, paragraphs 40, 42 and 43.

¹³³⁴ Press Release, IP/98/30.

¹³³⁵ Commission decision, *VBBB/ VBVB*, paragraph 60. See also the Report for the Hearing, on appeal, the *VBVB/VBBB Case*, page 43.

States concerned would not hesitate to take action to protect certain cultural interests should this be necessary."

We do not agree with this assessment. Sometimes the only, or most efficient, way of achieving a particular non-economic end is through agreements between undertakings. The discussion of corporate social responsibility in Chapter One indicates that, today, the Commission would probably agree with us. We accept that our proposal will reduce undertakings' use of corporate social responsibility, but only to the extent that this is inefficient.¹³³⁶

How could this system be implemented? The party relying on the article 81(3) exemption must demonstrate that the agreement fulfils article 81(3)'s first balancing test. If this is the case, it (and the opposing party) must list the various ways of achieving the relevant objectives to the same extent as the agreement.¹³³⁷ This is the right test, because we have already established that this is in line with the public interest under article 81(3)'s first test.

Imagine, for example, that agreement reduces the environmental impact of washing machine use in the European Union by prohibiting all machines that belong to energy categories D to G of the relevant Commission directive.¹³³⁸ One way of achieving this may be to allow all, or the majority, of undertakings in the relevant sector to agree to only produce washing machines better than or equal to this energy efficiency.¹³³⁹ Alternatively, the Commission could have proposed environmental legislation prohibiting the sale of washing machines, belonging to energy categories D to G of Commission Directive 95/12/EC, in the European Union. It, or the Member States could also have introduced more fundamental reform aimed at internalising the environmental externalities.¹³⁴⁰

¹³³⁶ The rule presented here also bears a passing resemblance to the subsidiarity test, see article 5 of the Treaty. The subsidiarity test asks whether, in certain areas, an action is best taken by the Community or the Member States, Craig and de Búrca (1998), page 127. "In practical terms, subsidiarity means that, when exercising its powers, the Community must, where various equally effective options are available, choose the form of action or measure which leaves the Member States, individuals or businesses concerned the greatest degree of freedom.", *The subsidiarity principle*, (1992) Bulletin of the EC, page 10-122. However, our rule does not seek greater freedom for the actors, but more efficient mechanisms for achieving the relevant objectives. Sometimes these two coincide, but this will not always be the case.

¹³³⁷ In Commission decision, *Olivetti/ Canon*, paragraph 56, the Commission refused to follow one, less restrictive, proposal because it thought that this would not achieve the agreement's benefits to the same extent. "The benefits of the increase of research and development, the improvement of technology and the strengthening of the competitiveness of the European industry through the transfer of technology could not be achieved without the joint venture. Without that cooperation, costs of R&D and production would be spread over a smaller number of units, and this would result in either an insufficient improvement of the products manufactured by one or both of the companies, or higher prices of those products. The grant of a licence would not have allowed the transfer of technology to the same extent as is allowed by a joint venture. The major involvement of the partners inherent in a manufacturing joint venture permits a permanent and intense flow of technology."

¹³³⁸ Commission, *Directive on Energy Labelling of Household Washing Machines*, see Annex IV.

¹³³⁹ See Commission decision, *CECED*, discussed in Chapters Two, Four and Eight.

¹³⁴⁰ See, Hahn and Hester (1989).

Assuming that the second or third suggestions above would achieve the end in question, just as effectively as the first option, then, subject to what is said in the rest of Section 5, the indispensability test should have prevented the adoption of Commission decision, *CECED*. This is on the assumption that the restriction on competition is more welfare reducing than the other two methods suggested above.

In Commission decision, *Synthetic Fibres*, for example, the Commission had been asked a number of times whether it would exempt an agreement on restructuring within this industry and each time had refused. At the same time it contacted Member States asking them to "...avoid aggravating the over-capacity problem by granting any form of State aid to the sector.", paragraph 12. It might also be possible for the Commission to suggest to Member States that they grant State aid, where this would be just as effective and have a less restrictive effect on competition?

Chapter One watered down this extreme efficiency rule however. It suggested that there may still be times when the decision-maker, in its discretion, could legitimately allow a restriction of competition under article 81(3) of the Treaty, even if this would not be the most efficient route. This might be the case where:

- inclusion of certain factors in the price mechanism might not be possible, or at least not at the level that the Community demands;¹³⁴¹
- the relevant objectives have not been achieved to the level promised by the agreement and allowing the restriction means that the relevant objectives could be achieved to this level more quickly than would otherwise be the case.¹³⁴² Without the agreement we might have to wait for a sufficiently large gap in the legislative programme. Fundamental reform, such as internalising environmental externalities, could take years.¹³⁴³

The Commission may be tempted to seize such cases for itself, as it is permitted to do under Regulation 1/2003, and resort to this method of 'legislation', where it has a lot of control, rather

¹³⁴¹ "Because adequate standards do not exist, some environmental costs are still not, or only partially, reflected in the price; moreover, the market economy is proving unable fully to achieve Community environmental objectives in all cases. In consequence, the various parties have felt the need to restrict competition in certain markets in order better to attain the desired environmental objectives.", Jans (2000), page 271.

¹³⁴² The Commission or Member States may also be bound to act multi-laterally in certain areas and so until agreement can be generated between States the Commission might achieve its ends through voluntary agreements between undertakings, as suggested in, SEC(92) 1986a, page 6. This is already a principle within the indispensability test as currently interpreted, see Commission, *Article 81(3) Guidelines*, paragraph 76 and Faull and Nikpay (1999), paragraph 2.166.

¹³⁴³ By way of example, an implementing regulation was not provided in sea transport for some 24 years. Recent Commission reports suggest that the 'new' Member States will take some eleven years to implement some of the binding European environmental legislation, *11 years for EU laws*, The Law Society Gazette, 14 October 2004.

than to using the normal routes, see articles 250-252 of the Treaty. This it should not do otherwise its acts may be *ultra vires*. However, it might be that the Commission believes that while legislation is the best option, the objectives that require protection are important enough to require a temporary restriction on competition until the appropriate legislation is enacted. In such a case the right course of action might be to grant an article 81(3) exemption until the relevant institutions have time to legislate. Such a policy should lie within the discretion of the Commission. Nevertheless, it will have to consider whether:

- (i) the inaction on the part of the institutions is, in itself, a policy decision. In other words, the institutions might have analysed the need for environmental protection legislation relating to the energy efficiency of washing machines. If they had decided that no such legislation was necessary because the appropriate level of protection had already been achieved, it would normally be wrong for the Commission to introduce such an exemption by this route;
- (ii) the same would apply where the Community has legislated in an area and the Commission decides that a specific risk has not been adequately covered. In the *Verband Case* there was already European legislation in place that sought to prevent firms from knowingly maintaining an imbalance between income and expenditure.¹³⁴⁴ Advocate-General Darmon argued for allowing a horizontal cartel seeking to make sure that the risk was more adequately covered than the European legislation demanded.¹³⁴⁵

Unless it can be shown that either the specific problem at issue in a specific case is materially different from the issues that the legislation sought to deal with; or, that circumstances have materially changed since the legislation was passed; then it is not the place for the Community Courts or the Commission to substitute their will for that of the legislature.

This additional change introduces a type of moral hazard. If the Commission is able to 'legislate' in this way it may reduce the Member States' incentive, through the Council, to take common positions in certain areas (although under certain circumstances it might increase it too). Nevertheless, there will be occasions when it is still better to take this path, at least until longer term solutions can be found and agreed upon.

It should be noted that this interpretation of indispensability also helps simplify the balancing task in the earlier part of article 81(3) of the Treaty. This is because where some of the

¹³⁴⁴ The *Verband Case*, page 427.

¹³⁴⁵ Although, ultimately, he felt that the restrictions on competition went too far it seems clear from the case that if the agreement had related to the fixing of net premiums, rather than gross premiums, he would have recommended an exemption, pages 445-446.

objectives could be achieved more efficiently in another way they should not be considered within the basket of benefits (or cons) of the agreement.

The "indispensability test" should be amended to restrict the impact of these other policy objectives upon competition policy. This should force the Commission to take account of the efficiency point, discussed in Chapter One.¹³⁴⁶ At the same time, the relevant objectives can be pursued via the article 81 mechanism where this is the best/ most efficient way of achieving them.

It should be noted that this is a long way from arguing that Treaty objectives are/ should be irrelevant to those implementing article 81. Nor can it be said that in this way we are effectively giving economic efficiency too much weight in the balance. Rather than promote that objective, we are promoting the development of an efficient market system, as a mechanism for wealth distribution.

6. CONCLUSION OF CHAPTER SEVEN

Non-economic objectives must be taken into account in article 81 of the Treaty. We have suggested that their consideration be confined to article 81(3). In our view, article 81(1) of the Treaty should be a pure economic efficiency analysis.

While accepting that non-economic objectives are relevant in article 81(3), Commission, *Article 81(3) Guidelines*, offer no guidance about how they should be integrated. This issue is of prime importance given how often these objectives have been considered in the past, and the inconsistent ways in which this has been done, see Part B. In addition, since 1 May 2004, the Member States' courts and competition authorities need guidance, they now have to apply article 81 of the Treaty in its entirety for the first time.

This guidance would involve explaining which non-economic objectives are relevant; defining each objective precisely,¹³⁴⁷ and clarifying its weight. This is because, in article 81(3)'s first test, these non-economic objectives must be weighed against the restriction of competition, established under article 81(1) of the Treaty. Chapter Eight discusses the issue of weight, although ultimately, this is a political decision and this thesis does not assign weights. Chapter Eight also provides a framework for balancing. This makes the process more predictable and

¹³⁴⁶ This would not only be the Commission but also the Member States' courts and competition authorities. However, these are the sort of cases that the Commission will likely seize for itself, under Regulation 1/2003. Furthermore, while it is debateable whether the Member States' institutions (and particularly their courts) are the appropriate fora for these questions, that should not undermine the substantive questions posed under article 81. It might lead us to question the validity of Regulation 1/2003, however. That debate is outside this thesis' remit.

¹³⁴⁷ The Netherlands Dutch Ministry of Economic Affairs, *The Liberal Professions*, pages 24, 49 and 84 and Gual (1995), page 21.

easier for the relevant actors to apply. Chapter Seven's Section 2 deals with four other issues in relation to this first test.

The first matter is what sort of balancing test we should have under article 81(3)'s first test. Various non-economic objectives have been considered and combined there. Sometimes their combined weight was necessary to 'justify' the restriction of competition. We argue that whether an agreement *undermines* non-economic objectives should also be a relevant consideration in the balance. Both issues should be assessed in every case. This must be done in a more structured way. This makes balancing within this provision more complex; but to do otherwise, would undermine the Treaty. It would also be unsustainable, from a logical perspective.

Secondly, Chapter Two and Part B showed many non-economic Community objectives being used in article 81(3) of the Treaty. Some of them had policy-linking clauses, some did not. Member State objectives are also relevant there, in cases of diagonal conflict. As in article 30 of the Treaty, we suggested that, ultimately, it is for the Community Courts to decide whether the Member State objective has been given excessive weight in the balance.

Thirdly, Chapter Five argued that the agreement's effects on product and geographic markets other than the relevant one should be considered in the economic efficiency analysis. We argued the same here, for non-economic objectives. Often the effects on non-economic objectives are not felt in the relevant market(s), so to do otherwise could mean ignoring them. This adds a new level of difficulty, but to do otherwise would risk ignoring the weight the Treaty gives to these aims.

Finally, sometimes the Commission and the Community Courts have demanded that the aim of the agreement be to achieve the non-economic goals, if they are to be considered. This imposes a purely formulistic requirement that is irrelevant. We should focus on the *effect* of the agreement, as opposed to the parties' aims. Even where the parties seek to be efficient, this is not for the 'good of all', but rather because they hope, ultimately, to make more profit for their firm. Section of the genius of capitalism is to unite the individual's aims with those of society, so that the one often achieves the other. The same can also be true in respect of non-economic objectives.

This leaves article 81(3)'s first test as a wide assessment. However, although many objectives must, theoretically be considered, their effect on welfare depends upon how much weight they are given in the balance. Furthermore, although an agreement frequently affects many non-economic objectives, these effects are normally not appreciable, and thus need not be considered. Chapter Eight discusses the application of the appreciability concept in such cases.

How much competition can be restricted also depends on the importance placed on article 81(3)'s other 3 tests. Article 81(3)'s second provision demands that consumers get a fair share of the agreement's resulting benefit. Section 3 suggested that the rule only makes sense where consumers are defined as private end-users of the relevant goods or services. However, it is inordinately difficult to assess whether such people get a fair share of the benefit. We showed that assessing the benefits for the parties' direct customers was sufficient. However, we argued that this provision should be deleted. Consumer protection objectives can (and have been) adequately considered under the first provision in article 81(3) of the Treaty.

Another implication of mere-balancing in article 81(3) of the Treaty is that, at the very least, a more consistent approach to the definition of 'competition' in article 81(3)(b) is needed. But, we suggest the deletion of this provision too. It is either irrelevant, as this can already be considered in the first provision's balance; or, it undermines that balance by promoting an objective to a level that is inconsistent with the Treaty's 'optimal balance'.

Finally, article 81(3)(a) of the Treaty should be redefined. In order to take proper account of the concept of optimal intervention, mere-balancing should be restricted to the occasions when it is the best way of achieving the end in question. This does not mean that non-economic objectives are unimportant. It is simply that, in order to preserve the market mechanism upon which the Community is primarily based, it is important to keep market distortions to a minimum. This is as long as non-economic objectives can be achieved in alternative (and equally effective) ways.

Considering all relevant non-economic objectives under article 81(3) of the Treaty, both those of the Community and those of the Member States, has two main benefits:

- this is in line with our view of the Treaty, described in Chapter Two, of a wide range of interlinking, self-reinforcing and conflicting objectives, none of which are permanently prioritised, but which should be blended to achieve the optimal Community balance; and,
- it should reduce the perceived need to distort article 81's other wording, such as 'the effect on trade between Member States' and the terms 'undertaking' and 'competition' to protect relevant objectives.

Potentially, such a wide first test means that many non-economic objectives will be applicable in every case. In reality, most will not be appreciable. That is not to say that the balancing exercise itself is going to be easy. It will be especially difficult to ensure consistency in light of the many decision-makers that Regulation 1/2003 creates. As a result, Chapter Eight is dedicated to providing a framework for this balancing process.

CHAPTER EIGHT: A FRAMEWORK FOR BALANCING OBJECTIVES WITHIN ARTICLE 81

1. Introduction
2. Defining an Over-Archiving Objective
3. Weight for the Right Balance?
 - 3.1. Qualitative and quantitative weight
 - 3.1.1. *Qualitative weight*
 - 3.1.2. *Quantitative weight*
 - 3.1.3. *Combining qualitative and quantitative weight*
 - 3.2. Likelihood that objective will be achieved/ harmed
 - 3.3. Discounting for the future
 - 3.4. Appreciability
 - 3.5. Conclusion
4. Comparing Apples and Pears - A Common Meter?
5. Conclusion

1. INTRODUCTION

Within article 81, conflicts between objectives are, principally, resolved through balancing.¹³⁴⁸ Given the significance of the balancing method, one would expect clear guidance about how the balancing exercise should be performed. None exists.¹³⁴⁹ Some doubt that the provision of useful guidelines is possible.¹³⁵⁰

Despite this pessimism, this chapter provides some foundations for balancing article 81's objectives. The Commission should either accept this framework, or propose a new one. Even if it accepts the framework proposed here, the Commission must also settle many of the political questions that are raised in this chapter.

This chapter's methodology would be important even if only economic freedom, economic efficiency and market integration were relevant in article 81. Chapter Two and Part B demonstrate that many other objectives should be (and are) considered in article 81.¹³⁵¹ This increases the complexity of the decision-makers' task, and the importance of such a framework.

Why is guidance desirable? It helps to create a unified body of decisions, rather than a set of individual ad hoc and inconsistent measures. As a result, the underlying objectives are more

¹³⁴⁸ That is not to say that exclusion is irrelevant in article 81, although it is quite rare, see Chapter Two. In addition, article 81(3)(b), discussed in Chapter Seven, states that the agreement must not afford the parties to it "...the possibility of eliminating competition..." As a result, article 81 contains within it a limited form of hierarchy, competition cannot be eliminated.

¹³⁴⁹ Perhaps, this is not so unusual. The OECD found a similar position in many other countries, OECD (2003), pages 3 and 10.

¹³⁵⁰ Bourgeois and Demaret (1995), page 110.

¹³⁵¹ The Introduction showed how prevalent these considerations are in article 81 decisions.

likely to be realised.¹³⁵² Without such a system, the overall quality of competition law would be endangered.¹³⁵³

Secondly, defining the balance's objectives, as well as the rules on how to perform it, informs those performing the balance of *what* they are trying to achieve and *how* to do this.¹³⁵⁴ This chapter shows just how crucial guidelines are in this regard, by illustrating the plethora of value judgments that are involved in article 81's balance. Guidance is particularly important today, see below.¹³⁵⁵ The Member States' courts and competition authorities, while bound to apply articles 81 and 82 in their entirety,¹³⁵⁶ cannot take decisions running counter to Commission decisions.¹³⁵⁷ For Member State bodies to replicate Commission decisions and achieve the 'right result' in a 'new' case, they need to know what the Commission is trying to achieve through its balance and what factors are relevant to it.¹³⁵⁸ Also, to generate an acceptance of balancing, as well as to improve their capacity for this, decision-makers need to have the process explained and justified to them.¹³⁵⁹ Greater understanding and acceptance of the balancing standard reduces arbitrariness and subjectivity, breeding a system of trust.¹³⁶⁰

¹³⁵² See, the Economic and Social Committee's *Opinion on the Twentieth Report on Competition Policy*, page 236 of Commission, *RCP 1991*, paragraph 2.1.2.9.; COM(2001) 486, pages 17-19 and Goldman (1998), page 327.

¹³⁵³ Van den Bergh (2002), page 35. This is also the implication from the Economic and Social Committee, *Opinion on the Twentieth Report on Competition Policy*, page 236 of the Commission, *RCP 1991*, paragraph 2.1.2.7

¹³⁵⁴ See, Goldman (1998), page 327 and Goldman and Barutskisi (1998), page 414.

¹³⁵⁵ Hildebrand (2002), page 3 and Wesseling (2000), page 112.

¹³⁵⁶ Regulation 1/2003, recital 4 and articles 5 and 6.

¹³⁵⁷ Regulation 1/2003, recital 22 and article 16.

¹³⁵⁸ D'Agostino (2003), pages 163-165. Is this so important? The Commission must be kept aware, in good time, of all article 81 and 82 actions by the Member States' competition authorities and courts, Regulation 1/2003, recital 21 and article 11(3). It can also appear before Member States' courts and competition authorities, Regulation 1/2003, recital 21 and article 15(3). See also the Commission, *Co-operation Guidelines - National Courts*, paragraphs 17-20 and 31-35. These bodies can also send questions regarding the application of articles 81 and 82 to the Commission, Regulation 1/2003, recital 21 and articles 11(5) and 15(1). See also the Commission, *Co-operation Guidelines - National Courts*, paragraphs 27-30. In exceptional cases, where the public interest of the Community so requires, the Commission can also reserve a case to itself, Regulation 1/2003, recitals 11, 14 and 17 and articles 10 and 11(6).

That said, the previous system, where the Commission alone took article 81(3) decisions, prevented it from concentrating its limited resources on curbing the most serious infringements, Regulation 1/2003, recital 3. We saw that these objectives (and thus balancing) are relevant in many cases. Unless the Member States' courts and competition authorities are given sufficient information about how to perform the balancing test, and are confident that they can do this correctly, then they will continue to refer (and arguably are bound to refer) many cases to the Commission/ Community Courts. This may undermine the reform process itself, see, Gyselen (2002), pages 79, 80 and 85. Furthermore, when the Commission acts under article 81, the case handlers there will be aided by the definition of a meta-objective, which they can apply in cases of conflict.

¹³⁵⁹ Miller and Rose (1993).

¹³⁶⁰ Porter (1995), pages ix and 90. This is particularly important where there are principal/ agent relationships involved; Bamberg and Spreman (1989); like those created between the Commission and the Member State authorities by Regulation 1/2003, see recitals 15, 17, 21, 22, 34 and articles 11, 15 and 16.

Finally, guidelines provide greater predictability (legal certainty) and transparency to undertakings, their advisers and other actors in the market place.¹³⁶¹ Since 1 May 2004 article 81's predictability is even more important. The system of prior notification has been replaced by a system of direct applicability.¹³⁶² Undertakings can still seek guidance on novel questions from the Commission, but are no longer protected from fines.¹³⁶³ In addition, more article 81 decisions should be taken under the new system.¹³⁶⁴

This chapter provides a framework for balancing. It does not stipulate precisely how to balance. To ensure the uniform application of Community competition law, the national courts and competition authorities must achieve consistent decisions (results) to those adopted by the Commission, see above. The method they use to achieve this is largely up to them. As the Commission notes:

"In the absence of Community law provisions on procedures...related to the enforcement of EC competition rules by national courts, the latter apply national procedural law...However, the application of these national provisions must be compatible with the general principles of Community law."¹³⁶⁵

Today, national courts and competition authorities can use their own balancing procedures. However, they must implement Community legislation in a way which is consistent with the general principles of Community law, such as clarity and certainty¹³⁶⁶ and achieves the same results as those of the Commission.

This minimum framework for balancing focuses on three areas. First, no balance can be properly conducted without defining what ultimate objective is being pursued; the Commission must enunciate article 81's meta-objective, Section 2.¹³⁶⁷ Secondly, due to the number, breadth and complexity of the objectives involved, explicitly defining the meta-objective (while necessary) may not sufficiently enhance clarity for those interpreting the competition provisions. Guidance is also needed on which factors should affect the relevant objectives' weight when the balance is performed. Section 3 highlights features that the Commission

¹³⁶¹ D'Agostino (2003), page 163; Goldman (1998), page 327 and Korah (1998), page 526. Chapter One explains why legal certainty is important.

¹³⁶² Regulation 1/2003, article 1.

¹³⁶³ Commission, *Guidance Letters Guidelines*, paragraphs 5 and 7. Considering the sensitivity of balancing objectives within article 81, as well as the Commission's reluctance to explain this issue thus far, is it likely that the Commission will answer such questions now? It seems unlikely, see also, Gyselen (2002), pages 79 and 80.

¹³⁶⁴ See, Regulation 1/2003, recital 3 and Lenaerts (2002), page 18.

¹³⁶⁵ Commission, *Co-operation Guidelines - National Courts*, paragraph 10. See also, Kerse (1998), pages 418 and 419 and the references made there.

¹³⁶⁶ See, Arnall, Dashwood, Ross and Wyatt (2000), pages 137-142 and Craig and de Búrca (1998), pages 357-364.

¹³⁶⁷ The expressions 'meta-objective', 'ultimate aim', 'over-arching goal' and 'optimal objective', as well as combinations of these terms, are used synonymously in this chapter.

currently considers when assessing restrictions of competition. It discusses the adequacy of the Commission's approach when applied to non-economic objectives. Finally, Section 4 asks how these objectives, which are often not directly commensurable, can be balanced rationally.

A word of caution. We seek a more coherent, transparent system for article 81 which closely follows the Commission's decisions. Legal certainty and the uniformity of Community competition law are important.¹³⁶⁸ That said, each case is different and there are an infinity of situations in which article 81 might apply. Objectives clash and value judgments must be made about the optimal balance *in each case*. Decision-makers exercise their discretion in these value judgments.

"Balancing is not a procedure leading in every case to a precise and unavoidable outcome."¹³⁶⁹

Since 1 May 2004, the Member States' authorities share this discretion. Their decisions will not always be precisely what the Commission (or the Council) would like. However, uniformity is not principally threatened by rogue judges, see above, but by the lack of transparency that shrouds balancing *as a process*. National authorities do not know what the Commission would do in their place, so they cannot emulate it. Through appropriate notices,¹³⁷⁰ the Commission can guide the balancing process,¹³⁷¹ eliminating many value judgments and thus limiting the exercise of discretion. But legal balancing is not mathematics. Where there is balancing, discretion will remain. This should be celebrated. Legal certainty is not the only value that legal systems espouse,¹³⁷² think of justice or fairness, for example. While the decision-maker should be guided, his (or her) hands should not be tied.

Finally, the Community is developing impact assessment tools. Impact assessment is a systematic method of analysing the likely effects of intervention by public authorities. It should improve the efficiency, quality and coherence of the Community policy development process. Why? Because, identifying the likely positive and negative effects of proposed policy actions on different Treaty objectives, means that more informed political judgments could be made in relation to proposed policy actions.¹³⁷³ This process bears some resemblance to that of the decision-maker in an article 81 balance. By identifying the likely positive and negative effects

¹³⁶⁸ Regulation 1/2003, recitals 21 and 22 and article 16.

¹³⁶⁹ Alexy (2002), page 100. See also pages 83, 105, 362-366, 383-385 and 402; Goldman (1998), page 327; Faull (1998), page 509 and 510 and Burton (1992), page 59.

¹³⁷⁰ The Commission, *Horizontal Guidelines*, expressly apply only to economic considerations, paragraphs 10.

¹³⁷¹ Notices help clarify thinking in relation to the application of the theory in practice, Baker and Wu (1998) and Vogelaar (1994), page 544.

¹³⁷² Frazer (1990), pages 622 and 623.

¹³⁷³ See, COM(2002) 276, page 2, which explains where the impetus for this came from.

of an agreement on the relevant objectives the decision-maker can make a more informed judgment about where the balance lies. Where appropriate, we examine how these impact assessments are performed, as this process may shed light on how article 81's balance might be conducted.

2. DEFINING AN OVER-ARCHING OBJECTIVE

It is important to define the ultimate objective of the balance.¹³⁷⁴ Why? It helps those performing the balance to know what they are trying to achieve.¹³⁷⁵ How? They can better determine which values will weigh positively/ negatively in the balance; and, where there is a problem of limited resources, as is often the case in our area, decide how much of each value to allow in order to arrive at the 'best decision'. Secondly, as set out above, defining overall guiding principles for decision-making helps create a unified body of decisions, rather than a set of individual ad hoc and inconsistent measures. Finally, defining a meta-objective provides greater predictability (legal certainty) and transparency to undertakings, their advisers and other actors in the market place.

Defining the optimal objective also has a downside. First, it is very hard (both in fact and politically) to find one that incorporates all the relevant values according to the weight we give them and yet is not meaninglessly wide, see below. Some even argue that the definition of an over-arching goal is theoretically impossible. It certainly requires difficult political choices, see below, but in relation to the values we discuss it is likely not impossible. The monism/ pluralism debate in political philosophy is relevant here. Monists believe that, in the event of a conflict between values, one can define an over-arching goal where the underlying values are compatible with each other. Pluralists disagree.¹³⁷⁶ However, the pluralists' assessment is contingent upon the values in dispute. The problems that lead them to their conclusions relate to fundamental, incommensurable, political values (such as dignity, liberty and the autonomy of the individual) and not the quantifiable values (normally) considered in our balance.¹³⁷⁷ To the extent that the values considered in article 81 are incommensurable, balancing is not rationally possible in article 81.¹³⁷⁸ The issue is not discussed further as the values that are weighed in article 81 are invariably quantifiable; to the extent that they are not, these problems are contingent on the pluralists' conception of such values. The Commission and the Community

¹³⁷⁴ See, the Economic and Social Committee's *Opinion on the Twentieth Report on Competition Policy*, page 236 of the Commission, *RCP 1991*, paragraphs 2.1.2.7-9.

¹³⁷⁵ See, Bell (1983), pages 26 and 27.

¹³⁷⁶ For a summary see Dworkin (2001) and Lilla (2001).

¹³⁷⁷ See, for example, Berlin (1990), pages 11-12.

¹³⁷⁸ See Zucca (2004), although note the contrary view of Lucy (1999), pages 153 and 154. This problem may apply to the extent that fundamental rights are considered in our balance, and possibly even other values such as 'fairness'.

Courts evidently do not share this conception because, as we have seen above, they generally balance these values.

Secondly, if the decision-maker is forced to define the meta-objective, this may reduce his/her discretion in a concrete case, making challenges to the decision easier. But, the limited discretion referred to here is limited arbitrariness. Restricting this may be disadvantageous to the decision-maker specifically seized of the matter; however, it benefits most other actors, as well as the Community competition system as a whole, see above.

Finally, the definition of a meta-objective may create rigidity, making it difficult to incorporate values that were not part of the test when it was established, or to disregard values that are no longer considered important.¹³⁷⁹ The importance of this issue can be overstated. Changes in values are not a daily occurrence. When values need to be added or subtracted the meta-objective can be changed to incorporate them. Expressly changing the meta-objective in this way further enhances clarity.

But defining the balance's objective is not merely helpful. Without a meta-objective *it is impossible to balance at all*. As Peczenik says:¹³⁸⁰

"Each principle, or value, can be a prima-facie reason of action. But they can collide...One needs then meta-reasons ("super-reasons") to choose between them."

The meta-objective defines, in a sense, the rules of the balancing game and is necessary for two reasons. First, without isolating the meta-objective we *cannot know* whether different objects or effects should be considered positively or negatively. For example, if we want to know whether increasing employment is to be considered positively or negatively in the balance, we have to refer to a meta-rule to tell us. We might say that increasing employment is positive because it provides a better quality of life (on the other hand, we might say it is negative because work is unpleasant). Why is a better quality of life important? Perhaps because it contributes to human dignity? We can continue this dialectic until we arrive at the meta-objective upon which all rational article 81 judgments are based.

But, aren't we already told whether specific values are positive or negative, in a Community context? The Treaty states what should be considered positively: "A high level of human health protection shall be ensured...", article 152(1), for example. However, the Treaty does not define all objectives that must be taken into account in the article 81 balance. For example, neither economic freedom nor efficiency are mentioned in the Treaty.

¹³⁷⁹ Although definition of the meta-objective does not mean that the values incorporated into it will always be given exactly the same weight. Rigidity is not created in this way, see Section 3.1.

¹³⁸⁰ Peczenik (1989), page 75. See also, Lucy (1999), pages 154-156; Burton (1992), pages 51-54 and Brkić (1985), page 44.

Definition of a meta-objective is also imperative, as without it we *cannot assign different weights* to the values in the balance. Unless we can do this we cannot solve conflicts through balancing. Imagine that, in a concrete case, employment comes at the expense of economic efficiency. Assume that both are to be considered positive values in our balance and that both cannot be fully achieved with our limited resources. Understanding the over-arching objective enables us to decide how much of each of these two entities is optimal, i.e. where the balance should lie between them. As we saw in article 152(1), sometimes the Treaty provides an insight into what weight certain values should be assigned, there it demanded a high level of protection. But what does a *high* level of protection mean? In addition, the Treaty does not provide a weighting for all the values it mentions; nor does it define what happens, for example, when two objectives requiring a high level of protection clash. On top of this, as we have seen, not all relevant values are even mentioned in the Treaty.

To this one might retort that courts perform balancing every day and rarely define a meta-objective. This is certainly true (the same can be said of academics¹³⁸¹), although there are exceptions.¹³⁸² However, this does not mean that they do not rely on a meta-objective, just that it is not explicit. This is likely due to the political controversy that such a definition would cause. And yet, unless the Commission defines it explicitly (and correctly), then, where balancing is required, the *Modernisation Proposals* cannot achieve their desired ends.

But, if a meta-objective is imperative, that does not mean that it is easy to define. It is very hard to select an optimal objective that incorporates all relevant values according to the weight we give them and yet is not so wide that it is meaningless. This, possibly combined with the sensitivity of defining this meta-objective,¹³⁸³ is probably why, at times, the institutions have tried to avoid defining an underlying objective in abstract terms. In one case, Advocate General Tesouro, when introducing article 81(1), although his words seem to apply more generally to the whole of article 81, said:¹³⁸⁴

"In relation to the *ratio legis* of that provision, the Court has stated that the requirements of protection of competition pursued by it cannot be defined in abstract terms but must be seen in the specific context in which the conduct of the undertakings came about."

Advocate General Tesouro is right that the balance is affected by the specific context of the agreement, see below. But, does this prevent the definition of an abstract objective? No. Even

¹³⁸¹ In her seminal article on the proportionality test De Búrca does not consider this issue, De Búrca (1993). Nor does Aleinikoff, in an equally influential article on balancing, Aleinikoff (1987).

¹³⁸² This has been accepted in German Public Law, for example, see Limbach (2000), pages 158-161; Emiliou (1996), pages 32-34, 43 and 57-59 and the references made there and Alexy (2002), pages 93 and 94. Alexy hints at the need for a meta-objective at pages 107, 404 and 405.

¹³⁸³ See, Bell (1983), page 27.

¹³⁸⁴ Case C-250/92 *Gøttrup-Klim v. Dansk Landbrugs*, page 5654.

when one is balancing in the specific context of a case, a meta-objective is needed in order to guide the process.¹³⁸⁵

So what should the over-arching objective be? Some hint that the sole objective of the balance should be economic efficiency. In Part A we saw that the Commission has said that the aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. This meta-objective is too narrow. Chapter Two demonstrated that, in the context of the European Union, other objectives should be (and are) taken into account in article 81 cases. The picture is further complicated because, as we move away from a 'pure economic' community,¹³⁸⁶ article 81's objectives, and the factors that need to be taken into account within it, are changing too.¹³⁸⁷ This means that a clear, consistent, picture may not emerge over time.

Some judgments refer to attaining the "...objectives of a single market between States."¹³⁸⁸ Others refer to "...the observance of the conditions of competition and unity of the market which are so essential to the Common Market..."¹³⁸⁹ Achieving European unity has also been mentioned as a goal.¹³⁹⁰ Perhaps in order to take account of the burgeoning number of values, article 81's underlying objectives have, at times, been defined very generally indeed. In Chapter Two we saw that the Community Courts have said that the competition rules aim:

"...to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers."

This is not very helpful, as it does not provide much content to, or guidance for, dealing with conflicts. Nor does taking the 'European social balance'¹³⁹¹ as article 81's underlying objective provide the disciplined framework that we seek, because it is an illusive and largely undefined

¹³⁸⁵ See, Heimler (1998), page 596.

¹³⁸⁶ See, for example, Streit and Mussler (1995).

¹³⁸⁷ Monti (2002), page 1077; Whish (2001), page 14; Ritter, Braun and Rawlinson (2000), page 17 and Bouterse (1994), pages 10-12, 54 and 55.

¹³⁸⁸ The *Consten and Grundig Case*, page 341; *Case 5/69 Franz Volk v. Vervaecke*, paragraph 5/7 and *Case 1/71 Société Anonyme Cadillon v. Firma Höss*, paragraph 6. See also, Bredimas (1978), page 91. Although, note the *Metro I Case*, paragraph 20, for example. Bouterse (1994), page 3 criticises this as "...insufficient for any clarification of what exactly makes up the spirit of Community action - and thus of article 85 [now article 81]..."

¹³⁸⁹ *Case 40/70 Sirena v. Eda*, paragraph 10.

¹³⁹⁰ See, Opinion 1/91 *Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty*, paragraphs 17 and 18. Although Rasmussen argues that when Mr Robert Lecourt left the ECJ the other judges lost their over-riding allegiance to this goal, Rasmussen (1993), page 3.

¹³⁹¹ This is implied in *Case C-185/91 Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff*, in the Opinion of AG Darmon, paragraphs 23 and 24. He also cites Fox (1986), page 982.

notion.¹³⁹² This argument need not be decisive, however. Over time, case law and Commission notices could flesh out these skeletal concepts.¹³⁹³

When the Commission considers the definition of a meta-objective, it might also refer to the Preamble of the Treaty? There, the High Contracting Parties state that:

"...the essential objective of their [the High Contracting Parties'] efforts [is] the constant improvement of the living and working conditions of their peoples..."

To the extent that this accurately reflects the Treaty objectives as they are currently interpreted,¹³⁹⁴ perhaps this would be a good objective, to be further clarified over time? Many clarifications are needed. For example, the meta-objective should indicate the time-scale over which the benefits are sought. Can short-term sacrifices be made for long or medium term gain? Should the development of economic activities be sustainable over the next five years, or fifty, see Chapter One?

The fact that the Commission has not clearly and accurately defined (or even, until recently, attempted this) its underlying objectives when implementing article 81 is deeply troubling.¹³⁹⁵ How does it decide the individual matters before it in case of conflict? While we do not suggest that outcomes are random, where the ultimate objectives remain undefined, there is certainly an implication that any balancing that does take place is done on an intuitive and not on a wholly reasoned basis.¹³⁹⁶ This is unacceptable for a public body.¹³⁹⁷

Even if each individual Commission decision were decided rationally and reflectively, the Commission's decision-making practice implies that there is no meta-objective that it is consistently trying to achieve. This suggests that decisions are taken on an ad hoc basis, as opposed to being part of an over-arching system.¹³⁹⁸ The Commission has been more explicit where market integration is involved in the balance.¹³⁹⁹ But even here, the Commission's notices are indicative of a mechanical, as opposed to a rational, reasoned, process, see Chapters One

¹³⁹² See, in this regard, Commission, *RCP 1996*, page 7 and COM(96) 90 "Europe is built on a set of values shared by all its societies and combines the characteristics of democracy - human rights and institutions based on the rule of law - with those of an open economy underpinned by market forces, internal solidarity and cohesion." On a similar point, cultural identity, see Amato (1999), pages 1, 9-15. See also, Jebson and Stevens (1995-6), pages 450, 451 and 460, discussing the objectives of Community competition policy more generally.

¹³⁹³ Alexy (2002), page 108.

¹³⁹⁴ This is questionable; see, for example, articles 177 and 178 of the Treaty on development co-operation.

¹³⁹⁵ Unfortunately, the European Convention is not any clearer than the Treaty, Cseres (2004), page 227.

¹³⁹⁶ The idea that balancing takes place either arbitrarily or unreflectively is one of Habermas' main critiques of it as a process, see Habermas (1996), page 259. See also, the reference to Schlink (2001), pages 445-465 in Alexy (2003b), page 436.

¹³⁹⁷ Finnis (1997), pages 215 and 216.

¹³⁹⁸ Indeed, Wesseling (2000), page 49, suggests that priorities are selected on a case-by-case basis.

¹³⁹⁹ See, for example, Commission, *Vertical Guidelines*, paragraphs 49-55.

and Three. They are of some help, but not much. Greater clarity in the underlying objectives pursued may lead to better quality decision-making as well as generating the other advantages referred to above.

Finally, the Commission might argue that it has an overall policy objective that is consistently applied in its case law. If this is correct then it is not obvious.¹⁴⁰⁰ This lack of clarity, and the enormous leeway that the Commission is given by the Community Courts, means that even if the Commission is using a proper system it needs to explain more clearly what it is.¹⁴⁰¹

These problems are magnified now that the *Modernisation Proposals* have been implemented. Decision-making devolves to national courts and competition authorities as well. The lack of clear guidance may lead to a disparate body of case law emerging from these various authorities, which will be hard to check. This is particularly serious, as the rules of the balancing game will no longer be principally applied by a Community institution. It remains to be seen how effective the Commission's monitoring procedures will be.

The difficulty for the Community Courts is that they have been led by the Treaty to allow the inclusion of various objectives within article 81 analysis. However, because of the structure of their review of its article 81 decisions (essentially a judicial review type process) they have been reluctant to intervene with the Commission's discretion and impose greater order.

A meta-objective must be defined in order for the balancing process to be clear, predictable and effective. It would also provide the decision-maker with guidance in difficult cases. The meta-objective needs to be both wide enough to include all relevant Treaty objectives and flexible enough to adapt to changes in these. We have not attempted to define a meta-objective, as this is a political task for which a lawyer is ill equipped, but we have suggested some relevant factors.

It may be that, due to the complexity of the underlying objective's constituent parts, the Commission cannot *immediately* find a notion that precisely and directly explains what the balance is. It might have to rely on Notices and cases, to illustrate where the balance should be drawn in a variety of instances, in order to produce a more specific picture via induction. This does not mean that the Commission can avoid constructing, at least internally, a coherent value framework in which its decisions can be placed and understood. Its long-term goal should be to clarify the meta-goal so that others can use it in a meaningful way.

¹⁴⁰⁰ Whish (2001), page 14.

¹⁴⁰¹ Forrester (1998), page 382.

3. WEIGHT FOR THE RIGHT BALANCE?

Determining an objective's weight is a difficult and politically controversial task.¹⁴⁰² Due to the number, breadth and complexity of the objectives involved, explicitly defining the over-arching goal may not sufficiently enhance clarity for those interpreting article 81, especially in the short term. Chapter Seven showed that both Community and Member States objectives, which contribute to the relevant ends, should be considered.

Guidance is also needed on factors affecting the objectives' weight in the balance.¹⁴⁰³ Section 3.1. discusses the relevant objectives' weight. Clear guidelines explaining what this should be in the abstract, while accounting for the particular circumstances of the case, are vital. Other factors impact upon what weight an objective should be given in a particular case. The two main ones are the *likelihood* that the objective will be achieved, Section 3.2., and, *when* the objective will be achieved, Section 3.3. Finally, the appreciability doctrine is discussed, Section 3.4., this can be employed to reduce the number of objectives in the balance, simplifying the decision-makers' task. The Commission already uses all of these methods. Here we highlight them, to make the balance more transparent. We also apply them to the objectives, outside of economic efficiency and freedom, examining some problems that this causes.

3.1 Qualitative and quantitative weight

Alexy has said that balancing can be broken down into three stages:¹⁴⁰⁴

"The first stage is a matter of establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principles justifies the detriment to, or non-satisfaction of, the first."

In order to balance, one must be able to rationally determine how much one objective will be infringed (and the competing one achieved). This is a quantitative assessment. There is also a qualitative assessment of the importance of the infringement (or achievement) of the principles at stake.^{1405 1406} The qualitative and quantitative elements must then be combined to ascertain the objective's weight in the balance. This process cannot be contemplated without reference to the balance's underlying objective, see above.

¹⁴⁰² Dworkin (1977), page 26.

¹⁴⁰³ This would be ultimately decided in light of the meta-objective.

¹⁴⁰⁴ Alexy (2003a), page 136. See also, Alexy (2002), page 102.

¹⁴⁰⁵ See also, The World Bank and OECD (1999), page 9 and Wathern (1988), pages 12 and 13.

¹⁴⁰⁶ In this paper, qualitative assessments indicate the abstract importance of an objective, based on assessments of its value or quality. Quantitative assessments ask how much benefit/ damage was done, in fact.

The Community Courts and the Commission state that the legal, economic, political and social context should be taken into account when applying article 81 of the Treaty.¹⁴⁰⁷ This allows a more accurate assessment of the agreement's qualitative and quantitative harm or benefits.

3.1.1 Qualitative weight

Two things must be decided under this heading. First, should the objectives have different qualitative weights in the balance? Secondly, if the first question is answered in the affirmative, what should these weights be?

Should the objectives have different qualitative weights in the balance? The Treaty does not *expressly say* that the objectives should be assigned different qualitative weights. Indeed, some suggest that they should not.¹⁴⁰⁸

However, the Treaty does refer to a 'high level of protection' in relation to some,¹⁴⁰⁹ but not all,¹⁴¹⁰ objectives. The 'high' appellation must mean something;¹⁴¹¹ environmental protection became a 'high' priority after the Treaty of Maastricht, before that, a high level was not demanded, for example. These textual differences are hard to explain, except in relation to the qualitative weight that the objectives might be given in the balance.¹⁴¹² Policy statements by the Commission, Council and European Parliament support the use of qualitative weight.¹⁴¹³ The ECJ may support this too.¹⁴¹⁴

¹⁴⁰⁷ In Commission, *RCP 1992*, the Commission says that competition policy cannot "...be pursued in isolation...without reference to the legal, economic, political and social context.", page 13. Also see, Commission, *RCP 1993*, paragraph 3; Case C-250/92 *Gøtttrup-Klim v. Dansk Landbrugs*, Opinion of AG Tesouro, page 5654; Case T-61/89 *Dansk Pelsdyravlærförening v. Commission*, paragraph 52; Case 45/85 *Verband der Sachversicherer v. Commission*, paragraph 15 and Joined Cases 25 and 26/84 *Ford-Werke and Ford of Europe v. Commission*, paragraphs 33 and 34. See also, Frazer (1990), pages 622 and 623 and Wesseling (2000), page 35.

¹⁴⁰⁸ Demetriou and Higgins (2003), page 197 and Wasmeier (2001), page 160 (in relation to the article 2 heads).

¹⁴⁰⁹ Article 127(2) of the Treaty demands that "...a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities." Also see, articles 152(1) (public health "...a high level of human health protection shall be ensured..."), 153(1) and (2) (consumer protection "...ensure a high level...") and 6 and 174(2) (environment "...aim at a high level of protection...") of the Treaty.

¹⁴¹⁰ Article 151(4) of the Treaty merely says, "...cultural aspects shall be taken into account..." See also, articles 157 (industrial policy "...shall contribute to the achievement...[without creating]...a distortion of competition"), 159 (economic and social cohesion "...take into account..."), 163(3) (research and development "...implemented in accordance with...") and 178 (development co-operation "...take account...") of the Treaty.

¹⁴¹¹ Loman, Mortelmans, Post and Watson (1992), pages 195 and 196.

¹⁴¹² 'High level' is an abstract appellation, so it cannot refer to a quantitative element, as opposed to 'a large amount' or 'a lot', for example. Also, use of the word 'level' is inappropriate for quantitative, but not qualitative, measures. Finally, article 2 of the Treaty refers to "...a high level of protection and improvement of the quality of the environment..." This links 'high level' with 'quality of the environment'. See, also, Krämer (2000), pages 6-9. Lenz (2000), pages 47-49, may oppose this position.

¹⁴¹³ The Commission has said that both qualitative and quantitative dimensions should be considered in Community policy impact assessments, for example, COM(2002) 276, pages 15, 16 and 19. It adopts a similar approach in its *Vertical Guidelines*, paragraph 120 (highlighting a qualitative and a quantitative dimension to weight when

The Treaty and the Community institutions imply that certain objectives should be given a high priority, and that others should not. If this level of priority were 'captured' in the objectives' qualitative weight in the balance, then article 81's weighing process would better reflect this preference. As a result, achieving/ undermining high priority objectives would count for more and undertakings would be more likely to consider them in their agreements.¹⁴¹⁵ This could undermine competition, but this seems to be justified by the Treaty, see Chapter Two.

If the objectives have different qualitative weights in the balance, what should these weights be? At the outset, we might differentiate between at least two distinct levels.¹⁴¹⁶ Those where a high level of protection is demanded, and all the rest. This would produce the following bifurcation:

discussing restrictions of competition). The Commission emphasises qualitative weight in other documents too, see; COM(2003) 745 final/2, page 17 ("...improving the health and safety of workers and the general public is a key political objective of the Community chemicals policy. Maintaining high levels of employment is also a priority." At page 30 the Commission refers to "...a high standard of environmental protection..."); COM(2002) 778, page 8 (the paramount importance of human rights); Commission, *Environmental State aid Guidelines*, recitals 20 and 37; it has called the protection of competition, the "...primary objective..." of Community competition policy, market integration remains a second important objective, COM(98)544, page 5 (see also, Commission, *Article 81(3) Guidelines*, paragraphs 13, 33 and 43 (although paragraph 21 undermines this somewhat) and Commission, *Vertical Guidelines*, paragraph 7) and Commission, *A Handbook on Environmental Assessment*, pages 33-35. The Council and the European Parliament also imply that both qualitative and quantitative dimensions should be considered, see, European Parliament and Council, *on the assessment of the effects of certain plans and programmes on the environment*, Annex II (assess "...the value and vulnerability of the area likely to be affected...", as well as the effects' magnitude) and Council, *on Community consumer policy strategy 2002-2006*, recital II(1), for example.

¹⁴¹⁴ Case C-233/94, *Germany v. European Parliament and Council* where Germany argued that consumer protection required a high level of protection, which the directive at issue had not achieved. The ECJ held that "...although consumer protection is one of the objectives of the Community, it is clearly not the sole objective. As has already been stated, the Directive aims to promote the right of establishment and the freedom to provide services in the banking sector. Admittedly, there must be a high level of consumer protection *concomitantly with those freedoms*; however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State. [my emphasis]", paragraph 48. The different objectives must be balanced. The ECJ seems to imply that the 'high' appellation has a *relative*, as opposed to an absolute, *qualitative weight*.

¹⁴¹⁵ On the benefits of this see Chapter One.

¹⁴¹⁶ This chapter only discusses the weight of Treaty objectives. The Commission must also explain the limits of the Member States' discretion for balancing their own policy objectives within article 81. Then the Member States must provide guidelines within these limits. This chapter does not discuss this issue further.

Qualitative weight	Policy
High	Employment, public health, consumer protection, environment, competition, market integration ¹⁴¹⁷
Not-high	Culture, economic and social cohesion, research and development, development co-operation ¹⁴¹⁸

Should these groups be further sub-divided? Is the 'value' of public health's 'high' appellation (article 152(1)) the same as that in article 174(2) (environment), for example? This is unclear. There are strong similarities between these articles. The Treaty uses the same word (high) in relation them both. On the other hand, the public health language (*ensure* a high level of protection) is stronger than that of environment (*aim at* a high level).¹⁴¹⁹ A similar split emerges in the 'not-high' band.

It may be that these textual differences do not reflect diverse priorities; but, on balance, a second sub-division along these lines probably better mirrors the Treaty's wording.¹⁴²⁰ If this Treaty language signals a prioritisation then reflecting this in the objectives' qualitative weights would be beneficial, see above. Tentatively, I suggest the following categories:

Qualitative weight	Policy
High	Heavy Public health, consumer protection, competition
	Light Employment, environment, ¹⁴²¹ market integration ¹⁴²²
Not-high	Heavy Research and development
	Light Culture, economic and social cohesion, development co-operation

It is questionable whether this 'ranking' is reflected in Community policy initiatives.¹⁴²³ This is important, because the Commission is given a lot of discretion in relation to weighing and the Community Courts are unlikely to interfere with its policy, see Chapters Two and Seven.

Further sub-divisions are also possible. For example, due to the breadth of many policy heads one might ask whether the whole objective should be given the same weight. Take consumer

¹⁴¹⁷ Despite Chapter Four's conclusions, economic efficiency and market integration are here due to the emphasis placed upon them by the Commission in its policy statements, see above and Chapter Two.

¹⁴¹⁸ Industrial policy is not included because of article 157(3) of the Treaty. However, in Chapter Four I noted that it is considered in article 81 despite this provision.

¹⁴¹⁹ One could also argue that the words '...ensure that...' indicate a hierarchical threshold, as was the case for '...eliminating competition...' under article 81(3)(b) of the Treaty. This point is not considered further here.

¹⁴²⁰ On the importance of the Treaty's wording in strengthening environmental protection considerations, see, McGillivray and Holder (2001), Section IV, for example.

¹⁴²¹ One could justify the 'promotion' of environmental protection into the 'heavy' category on other grounds. For example, it is included as a principle in article 6 of the Treaty, see, Monti (2002), page 1078 and Hession and Macrory (1998), page 103; it is mentioned in article 2 of the Treaty; and the Commission often emphasises its importance, for example, COM(2003) 338.

¹⁴²² As noted in Chapter Three, the importance of market integration was waning. This may have changed since 1 May 2004 and the accession of the new Member States, it is too early to tell.

¹⁴²³ See, for example, the Council, *Multi-annual Strategic Programme 2004-2006*, (15896/03), which cites five principle policy goals, which essentially mirror all the 'high' heads, page 11.

protection, article 153(1) of the Treaty refers to protecting the "...health, safety and economic interests of consumers..." Should all three interests be assigned equal weight?¹⁴²⁴ Without denying the importance of consumers' economic interests, surely their health and safety are of greater consequence? The Treaty provides some support for further sub-division; several articles expressly provide for prioritisation.¹⁴²⁵ It is already Council and Commission practice to focus their initiatives on more precise goals in all areas.¹⁴²⁶ This makes their achievement more likely.¹⁴²⁷ This would be re-enforced by reflecting the importance of these goals in their qualitative weight in article 81's balance, see above.

The discussion this far has revolved around whether the two basic categories ('high' and 'non-high') could be sub-divided. This seems possible. We suggest further categorisation, mainly for illustrative purposes, rather than to provide concrete bands. Even if these were agreed, there is a further problem. There is no real guidance on the *relative values (weights)* of the high and 'non-high' appellations in the Treaty or elsewhere. How much more important (weighty) are policies that require a high level of protection than those that do not? The same point can be expressed in relation to the further sub-divisions suggested above. How much more weight does a 'High-Heavy' policy carry than a 'High-Light' one, for example?

This point is fundamental. All that we have discussed so far has been a tentative lexicographical or ordinal ranking. This gets us part of the way, but is insufficient for balancing. Why? Ordinal rankings cannot be used to weigh more than two objectives in the balance.¹⁴²⁸ Arguably, balancing in article 81 normally involves more than two objectives: economic freedom, economic efficiency and at least one other. Furthermore, even where only two objectives are balanced, an ordinal ranking does not provide conclusive help where the balance involves other

¹⁴²⁴ A similar point could be made in relation to most other policy-linking clauses, see articles 125 (employment); 151(1) and (2) (culture); 152(1) (public health); 157(1) (industry); 158 (economic and social cohesion); 163 and 164 (research and development); 174(1) (environmental protection) and 177 (development policy).

¹⁴²⁵ See, articles 161 (economic and social cohesion); 166(1) (research and development) and 175(3) (environmental protection).

¹⁴²⁶ See, for example, Commission, *Review of the Rolling Programme of Actions of the Consumer Policy Strategy 2002-2006*, SEC(2003) 1387, page 3; COM(2002) 778, pages 9 and 10 (cultural events of major importance); COM(2002) 714, pages 11-24; Council, *on Community consumer policy strategy 2002-2006*, recital II(3); Commission, *A Handbook on Environmental Assessment* and Commission, *Environmental State aid Guidelines*, see recitals 31 and 32, and references made there.

¹⁴²⁷ See, for example, COM(2002) 208, page 11 and COM(1999) 587, paragraphs 17-24 and 27.

¹⁴²⁸ D'Agostino (2003), page 7 and Adler and Posner (1999), page 192.

dimensions to the ranked one.¹⁴²⁹ This is the case in article 81's balance, where the quantitative dimension is also relevant, see below.¹⁴³⁰

The decision-maker must employ qualitative weights for the objectives *relative to* one another,¹⁴³¹ not just rank them. Where can we get guidance on these weights? The Preamble and article 2 of the Treaty provide some help, but are not precise enough to resolve the matter, particularly while article 81's meta-objective remains undefined. To our knowledge, despite frequently balancing objectives (and implying that the qualitative dimension is important, see above), the Community institutions' statements rarely explain what the objectives' relative weights are in general, let alone provide their *relative qualitative weights*, see Section 3.1.3.¹⁴³² The Commission's decisions in this area are opaque and unsatisfactory, see Part B and Section 4 below.

Given their importance for balancing, why haven't relative qualitative weights been established, at least for the major objectives? Qualitative weights are only needed if objectives are ranked. Earlier, we used textual arguments to suggest that the Treaty ranks objectives. Yet, the Community Courts would probably place more emphasis on teleological arguments in this area, see Chapter Two. So, while textual arguments provide some help, they cannot be relied upon entirely. Having said that, we have seen some evidence that the ECJ does not ignore the 'high' and 'non-high' appellations, at least.

Does the Commission consider the qualitative aspect (and thus ranking) irrelevant? One could argue that this is the case. Qualitative weight is not alluded to in the Commission's guide to public health impact assessments, for example.¹⁴³³ The Community Courts give the Commission a lot of leeway, as regards the balance, Chapter Seven. It is unlikely that they would contradict the Commission if it were to adopt such a stance. And yet, the idea that qualitative weight is irrelevant is out of synch with many Community institutions' policy statements, see above. Furthermore, while textual arguments are not decisive, they are hardly irrelevant as a means of Treaty interpretation.¹⁴³⁴ Even a basic ranking of weights would help better achieve article 81's

¹⁴²⁹ Knowing that A has a higher ranking than B, does not tell us whether A has a higher ranking than 2B.

¹⁴³⁰ While incorporating qualitative weight within his formula, Alexy (2003b), pages 440 and 446, Alexy sidesteps the issue of how it would apply in practice; his examples assume equal qualitative weight between rights. He is forced to do this as his triadic scale only produces an ordinal ranking.

¹⁴³¹ Unless, in a particular case, the qualitative weights can be ignored, see last footnote.

¹⁴³² Even where a balance was arrived at I have found no explanation about what the qualitative weights are, see, Commission, *Environmental State aid Guidelines*, Section E, for example.

¹⁴³³ Commission, *Ensuring a high level of health protection*, page 9. The Commission does not explain why the qualitative element was ignored, and may not have specifically considered the issue.

¹⁴³⁴ See, Arnall (1999), pages 516 and 517 and the references made there, for example.

meta-objective. As a result, the qualitative element should not be irrelevant, nor is the Commission likely to treat it as such in the future.

If ranking is appropriate, the relative qualitative weights must be established. However, this is not only extremely difficult, it is also politically controversial, see above.¹⁴³⁵ This may be why they have not already been provided.¹⁴³⁶ The Commission avoided discussing this issue publicly while it alone applied the article 81(3) exemption. Since 1 May 2004 this approach is more difficult to justify. The Member States are now directly implicated in this decision-making process and will push for clarity.

Future Treaty changes should explicitly deal with the qualitative weight to be applied to each policy head, or at least allow the decision-makers to do this in concrete cases.¹⁴³⁷ In the meantime, the qualitative weight to be attributed to those objectives not set out in the Treaty, as well as the relative and absolute weight of Treaty objectives, should both be refined and explained through the judgments and decisions of the Commission and the Community Courts. Commission Notices would be particularly useful in resolving ambiguities in the short term.

The Commission should clearly rank or weight the qualitative values.¹⁴³⁸ To keep the political problems to a minimum, this system of values should be as simple as possible, possibly having only two bands, for example. While the Commission should account for the 'high' and 'non-high' appellations in the Treaty, from a strategic point of view, it may be better for it not to rely solely on the Treaty when producing the framework.¹⁴³⁹ This would give it more flexibility about which policies to favour at any given time. This approach is less transparent, but the Commission could reduce such problems through regular notices etc., which could reflect the priorities in its annual legislative and work plans, for example.¹⁴⁴⁰

Until this has been done, the relevant Member State actors will not have the relevant tools (or sufficient experience) to rationally provide different, relative, qualitative weights for the

¹⁴³⁵ In 2002 the Commission promised to produce detailed technical guidelines on how to conduct consolidated impact assessments for economic, social and environmental factors, COM(2002) 276, page 16 and COM(2002) 278, page 7. The Commission would have had to examine the qualitative weight questions discussed in this Part. This is fundamental for balancing. Its failure to publish these guidelines indicates how sensitive the matter is.

¹⁴³⁶ Instead, the Commission has suggested using methodologies, such as internalising externalities, cost-benefit analysis and multi-criteria analysis, COM(2002) 276, Annex 2. They give weight to the qualitative aspect, however, they may not do this in line with the Treaty, see Section 4.

¹⁴³⁷ Indeed it has been suggested that article 3 of the Treaty should more clearly hierarchise the different Treaty objectives, Whish (1998), pages 462 and 501 and Kirchner (1998), page 515.

¹⁴³⁸ See, Forrester (1998), page 382.

¹⁴³⁹ The Community Courts would likely accept this approach as long as all the relevant objectives were considered, see Chapters Two and Seven.

¹⁴⁴⁰ See, COM(2003) 645, for example.

objectives in the way the Commission would like. In 2002, the Commission declared its intention that impact assessment play:

"...a major role throughout the process of improving the quality of European legislation, providing a decision-making aid but not taking the place of political judgment."¹⁴⁴¹

Obviously, judges (and national competition authorities) take political decisions too.¹⁴⁴² But their lack of experience; lack of accountability; and, the fact that the 'wrong decision' may undermine the achievement of objectives here and in other areas¹⁴⁴³ means that the Commission should provide the necessary guidance. In a balance there is always a margin of discretion, see above, but there is currently so little guidance that this discretion demands fundamental policy choices.

As a result, until concrete guidance is given, the Member States' authorities should adopt an interim position. The best strategy would be for the decision-maker in a specific case to seek Commission help on qualitative issues before coming to a decision,¹⁴⁴⁴ Regulation 1/2003, articles 11(5) and 15(1) allow for this.¹⁴⁴⁵ The quantity of potential references may lead to bottlenecks, however. If the Commission is not forthcoming then, the national competition authorities might adopt a common position, either themselves, or through the Advisory Committee.¹⁴⁴⁶ For example, they could assume that all objectives have the same qualitative weight. Then they could conduct the balance, see below. If, after that, the result is ambiguous, then more weighty (high) objectives might be given decisive weight. Their decisions may be appealed to the Community Courts, this can only be beneficial in the long term.

3.1.2 Quantitative weight

A determination of how much each relevant objective will be infringed/ achieved is also relevant. This is a quantitative assessment. For example, it should be relevant whether, in a particular case, the positive (or negative) environmental repercussions would be felt throughout the whole Community or in just a part of it.¹⁴⁴⁷ It should also be relevant how long these effects

¹⁴⁴¹ COM(2002) 275, page 3.

¹⁴⁴² See, for example, Sturges and Chubb (1988), Chapter Six.

¹⁴⁴³ See, for example, COM(2002) 208, section 3 and COM(2002) 276.

¹⁴⁴⁴ The same applies to undertakings, but the Commission has already sought to reduce their power to do this, see, Regulation 1/2003, recital 3 and Commission, *Guidance Letters Guidelines*, paragraphs 6-10.

¹⁴⁴⁵ The Commission might even take up the case itself, Regulation 1/2003, recital 14 and article 10.

¹⁴⁴⁶ See, for example, Regulation 1/2003, recital 15 and Commission, *Co-operation Guidelines - NCAs*, paragraphs 1, 43 and 58.

¹⁴⁴⁷ See, Commission, *Fining Guidelines*, page 3, for example.

will last.¹⁴⁴⁸ These issues should be reflected in the balance. Section 4, below, examines how this might be done.

3.1.3 Combining qualitative and quantitative weight

The next step is to combine each objective's qualitative and quantitative weights. Generally, the Community institutions do not explain what the objectives' relative weights are in general, let alone their relative qualitative weights.¹⁴⁴⁹ More rigour is needed both in relation to this and in explaining how these values are combined in the balance.¹⁴⁵⁰

Some argue that context often has more importance than the Treaty's specific wording.¹⁴⁵¹ While the context may affect the application of the general rule, over time, one would expect objectives such as environmental protection (which needs a high level of protection) to 'win' more balances than objectives for which there is no such requirement.¹⁴⁵² This is after all, we believe, the will of the Contracting Parties. Sections 3.1.1. and 4 discuss how to set/ measure these qualitative and quantitative weights. This process must take account of article 81's meta-objective, as well as the factors outlined in Sections 3.2. to 3.4.

¹⁴⁴⁸ See, Commission, *Fining Guidelines*, section 1(B) and Commission, *Vertical Guidelines*, paragraph 133.

¹⁴⁴⁹ The 'clearest' (if incomplete) Commission statement on this issue appeared in the Draft Commission, *Article 81(3) Guidelines*, paragraph 38, said that non-economic objectives could be considered in article 81(3) but added that it was not "...the role of article 81 and the authorities enforcing this Treaty provision to allow undertakings to restrict competition in pursuit of general interest aims." This was removed in the final version of the Commission, *Article 81(3) Guidelines*, paragraph 42, and in my view was not an accurate reflection of the position at law. Otherwise, statements give little or no guidance about what the qualitative weights are. See, for example: COM(2004) 60, pages 31-33 (environment with other policies); COM(2003) 745 final/2, pages 20-22; COM(2003) 723, pages 19-23 and 31 (environment and competitiveness); COM(2003) 338, page 8; COM(2002) 778, pages 33 and 34 (culture and competitiveness of European programme industry); COM(2002) 714, pages 2, 3, 7, 17, 20 and 25-28 (social, environmental and economic impacts); COM(2002) 262, pages 16-18 (environment, health and industrial policy); COM(2002) 208, pages 7, 12 and 24 (consumer policy and other policies); European Parliament and Council, *on the assessment of the effects of certain plans and programmes on the environment*; Commission, *on the links between regional and competition policy*; Council, *on Community consumer policy strategy 2002-2006*, recitals 2 and 5; COM(2001) 88 (industrial policy, health and the environment), Annex I; Commission, *Community policies in support of employment* and Commission, *A Handbook on Environmental Assessment*, pages 54-56 and 63 (environmental, social and economic impacts).

¹⁴⁵⁰ Alexy (2003b), pages 440 and 444, multiplies them. The Commission adds the qualitative and quantitative elements in Commission, *Fining Guidelines*, section 1(B), but this is the same as Alexy's method, mathematically, because the quantitative element is itself a multiple of the qualitative one. Multiplication is appropriate as it accounts for the relative nature of the qualitative element.

¹⁴⁵¹ Collège d'Europe (1998), page 229, suggest that the practical effect of these 'high' labels appears to be minimal. Monti (2002), page 1075, does not seem to agree.

¹⁴⁵² Schmid (2000), pages 164 and 165. This is as long as the 'high' appellations are equivalent in the various policy-linking clauses, see above.

3.2 Likelihood that objective will be achieved/ harmed

Uncertainty is our constant companion, but how to deal with her? Imagine that significant harm *could* be done to a relevant objective by the agreement in question, but the *likelihood* of that harm occurring were small. Should the decision-maker account for certainty, or the lack of it?

Rational actors choose options that maximise their expected benefit. Logically, the value of an objective in a balance would be its *expected* benefit (or harm); that is the weighted average of the benefit (or harm) if it occurs.¹⁴⁵³ We do not 'maximise' benefits under article 81, instead, we evaluate whether the factors on one side of the balance have more weight than those on the other side. Nonetheless, the notion of *expected benefit* is relevant here too.¹⁴⁵⁴

The Commission discusses this issue in many policy areas;¹⁴⁵⁵ including in relation to restrictions of competition.¹⁴⁵⁶ Where the object of an agreement is not to restrict competition, article 81(1) should take account of actual effects on competition but it "...must also take account of the agreement's potential effects on competition..."¹⁴⁵⁷ Presumably, potential effects on the objectives considered in article 81(3) of the Treaty should also be considered? The Commission has said that the *likelihood* of, for example, each claimed efficiency under article 81(3) must be substantiated.¹⁴⁵⁸

How should this factor impact upon the balance? One possibility is a sliding scale.¹⁴⁵⁹ The greater the uncertainty about whether or not consumer protection is undermined, for example, the less weight consumer protection has in the balance. In theory, this is the 'perfect' option as it

¹⁴⁵³ This is an accepted part of decision theory, see, for example, Schick (1997), page 35.

¹⁴⁵⁴ See, for example, Slote (1989).

¹⁴⁵⁵ For example, this factor was considered in a guide to undertaking health impact assessments in public health, Commission, *Ensuring a high level of health protection*, page 9.

¹⁴⁵⁶ This is *not* the same as considering a reduction in potential competition between the parties to an agreement, on the relevant market, essentially the effect discussed in contestable market theory, see Joined Cases T-374/94, etc., *European Night Services v. Commission*, paragraph 137. For a discussion of contestable market theory see Motta (2003), section 2.6.2. Imagine an agreement between monopolist (A) and its only potential competitor (B). Where there is a contestable market, there is a *certain* repercussion on the market due to the removal of B, "...the incumbent firm will not charge the monopoly price, but the price which is just enough to cover its average cost...", Motta (2003), page 73. If the market were extremely contestable, A would have been charging at average cost and cannot charge a monopoly profit. If the market were barely contestable, A would already be charging a near monopoly rent and the damage (price increase) would be less. In both cases damage is *certain*. The *extent* is not.

¹⁴⁵⁷ Case C-7/95 P, *John Deere Ltd. v. Commission*, paragraph 77 and, more generally, Goldman and Barutciski (1998), page 415.

¹⁴⁵⁸ Commission, *Article 81(3) Guidelines*, paragraph 51.

¹⁴⁵⁹ This is what Alexy suggests in relation to constitutional balancing, see Alexy (2003b), pages 446-448 and Alexy (2002), pages 414-422.

seeks to calculate the exact probability-weighted average of the benefit (or harm). In practice, the level of uncertainty is often hard to predict.¹⁴⁶⁰

One alternative is to assign ratings (such as low, medium and high) to reflect the probability that a specific objective would be achieved (or harmed).¹⁴⁶¹ In this way, one could take account of the expected benefit (or harm), but reduce difficulties related to precise risk-quantification.¹⁴⁶²

The Commission has not chosen this strategy. Instead, these effects are simply ignored unless the agreement has "...likely anti-competitive effects."¹⁴⁶³ [my emphasis].¹⁴⁶⁴ In *BAT and Reynolds v. Commission*,¹⁴⁶⁵ for example, the agreement created a situation in which a potential restriction on competition could arise in the future (depending on the behaviour of two parties to the agreement as well as that of unknown third parties). The ECJ thought it unlikely that this situation would arise, but it was possible. The Commission ignored these potential anti-competitive effects. The ECJ supported it.

This formulation is more convenient than Alexy's.¹⁴⁶⁶ Perhaps we can ignore events/effects that are not *likely* in our article 81 balance? Is this acceptable? In relation to some objectives the answer is probably yes. For example, article 178 of the Treaty (development policy) says:

"The Community shall take account of the objectives...[of Community development policy] in the policies that it implements which are *likely* to affect developing countries. [my emphasis]"

However, where we are not specifically told to ignore all but the likely effects then Alexy's three-part scale is a better compromise. Why? This convenience may lead us to ignore (potentially) important outcomes simply because we cannot show a high level of probability that an agreement will cause them. Significant precision (and weight) is sacrificed for convenience.

¹⁴⁶⁰ Alexy (2002), page 417, "...empirical knowledge of this quality is practically never available." Attempts to get round this problem can be found in: Jeffrey (1983) and Sahlin (1990).

¹⁴⁶¹ See, Alexy (2003b), pages 446-448.

¹⁴⁶² By only taking account of likely events, the Commission may also be seeking to simplify the balancing test by reducing the number of objectives considered there. This could also be achieved in the ratings alternative by ignoring all expected benefits (or harm) that have a low outcome probability.

¹⁴⁶³ In relation to article 81(1) see Commission, *Article 81(3) Guidelines*, paragraph 24. Later in the paragraph the Commission uses the alternative phrase "...with a reasonable degree of probability..." The same guidelines discuss the article 81(3) position at paragraphs 55-58, the relevant efficiencies, for example, must be "...likely to materialise.", paragraph 56 and in relation to consumer benefits, refer to "...any actual or likely negative impact caused...", paragraph 85.

¹⁴⁶⁴ Note that this is different from the notion of appreciability. There the effect must be appreciable. What we are discussing here is that the likelihood of the effect occurring, regardless of what that effect will be.

¹⁴⁶⁵ Joined Cases 142 and 156/84, *British American Tobacco and R. J. Reynolds v. Commission*, paragraphs 57-59.

¹⁴⁶⁶ Although it is not clear what probability a 'likely' event must have, it must be reasonably high.

Furthermore, in relation to some objectives, ignoring all but likely outcomes seems plain wrong. Article 174(2) (environmental policy) states that Community environmental policy "...shall be based on the precautionary principle..." The precautionary principle is not defined in the Treaty but the ECJ has interpreted article 174(2):

"Where there is uncertainty as to the existence...of risks...the institutions may take protective measures without having to wait until the reality...of those risks become fully apparent."¹⁴⁶⁷

This leaves open the question of how much certainty is needed;¹⁴⁶⁸ but, the implication is that even where there is considerable uncertainty as to the *existence* of risks in relation to environmental protection, these risks (and potential benefits?) can still be weighed in the balance. One might remark that the ECJ only said *may* take such methods, but the Treaty says that the precautionary principle *shall* be taken into account.¹⁴⁶⁹ As a result, only considering *likely* environmental risks probably infringes the Treaty in relation to the environment.

The Treaty only mentions the precautionary principle in relation to environmental policy. This has not prevented the Commission from suggesting it should also apply in other areas.¹⁴⁷⁰ It may be appropriate to extend it to all objectives that require a high level of protection? Then these objectives will be given special protection.

Where uncertainty occurs, the weight these objectives are given in the balance should be less than it would have been if we were certain that the specific problems/ benefits would occur.¹⁴⁷¹ Bayesian logic suggests multiplying the objective's weight by the probability of achieving it. If possible, the probability should be calculated. Where this is impossible, approximations of probability should be used; values need to be assigned for them.¹⁴⁷² This is, somewhat, arbitrary, but at least it is relatively accurate and clear. To simplify the balance the Commission may continue to ignore objectives with a low, or even a medium risk, unless the precautionary principle applies to the objective in question.¹⁴⁷³

¹⁴⁶⁷ Case C-157/96, *The Queen v MAFF, ex parte National Farmers' Union*, paragraph 63.

¹⁴⁶⁸ Majone (2002), pages 91-95 and Scott and Vos (2002), pages 254-273 and 283-286.

¹⁴⁶⁹ This is confirmed in the French ("...doivent être intégrées..."), Spanish ("...deberán integrarse...") and Italian ("...devono essere integrate...") versions of the Treaty, for example.

¹⁴⁷⁰ COM(2000)1, pages 2, 9 and 22. See also, Majone (2002), pages 90 and 95-98.

¹⁴⁷¹ Use of the precautionary principle must be proportionate and based on the costs and benefits of action and lack of action, COM(2000) 1, pages 17-19.

¹⁴⁷² For example, certainty = 1, high risk = 0.75, medium risk = 0.5, low risk = 0.25.

¹⁴⁷³ Majone (2002), pages 101-108, explains that the precautionary principle may also mean that all consequences will be considered, rather than the 'most likely' consequences. As he explains, this would be a mistake.

3.3 Discounting for the future

An agreement's costs and benefits occur over time. Economic analysis and decision theory¹⁴⁷⁴ tend to assume that a given unit of benefit today matters more if experienced now than if it occurs in the future. Why? People are impatient and prefer their benefits now. Secondly, if we invest capital, rather than consume it now, these resources should yield a higher level of consumption in a later period. Where the benefits of investment exceed the 'costs' of impatience, it is worth waiting this extra period before consuming.¹⁴⁷⁵

"Discounting is...the mechanism through which one finds the present value of future benefits and costs."¹⁴⁷⁶

When balancing we should account for when costs and benefits occur. Then, their weight in the balance will better reflect the harm/ benefit that is caused.¹⁴⁷⁷

The Commission encourages discounting in article 81's balance. In paragraph 51 of its *Article 81(3) Guidelines* it states that *when* each efficiency will be achieved is relevant. Paragraph 55 explains that this allows the decision-maker to verify the value of the claimed efficiencies. A similar point is made in section 3.4 of the same guidelines, which discuss the 'fair share for consumers' test.

An analogous process is justified in relation to other objectives. The predicted harm (or benefit) that arises as a result of the agreement should be discounted in the balance, depending upon when it occurs. Improvements in environmental protection or public health today are worth more than equivalent improvements tomorrow.

However, specific problems arise in relation to some objectives. For example, depending upon the circumstances, increasing the discount rate has an ambiguous effect on environmental protection.¹⁴⁷⁸ On one hand, higher discount rates may encourage discrimination against future generations. If social costs occur well into the future and net social benefits occur in the near term, high discount rates make the project more acceptable in the balance, think of global warming.¹⁴⁷⁹ On the other hand, a low discount rate would discourage development projects that compete with existing environmentally benign land use. This may slow the depletion of limited natural resources.

¹⁴⁷⁴ See, respectively, Broome (1999), Chapter Four and Schick (1997), pages 64-68.

¹⁴⁷⁵ Pearce and Turner (1990), page 213 and Broome (1999), pages 53-67.

¹⁴⁷⁶ Pearson (2000), pages 77 and 78.

¹⁴⁷⁷ Discounting is used in impact assessments for Community policy, COM(2002) 276, pages 12, 16 and 19.

¹⁴⁷⁸ See, Broome (1999), section 4.4.

¹⁴⁷⁹ For a discussion of this see, *Degrees of Difference*, The Economist, 1 May 2004, page 80, and more generally see Pearce and Turner (1990), pages 217-224 and Pearson (2000), pages 86 to 94.

How can we value the discount? At paragraph 88 of its *Article 81(3) Guidelines* the Commission explains:

"The discount rate applied must reflect the rate of inflation, if any, and lost interest as an indication of the lower value of future gains."

The appropriate discount rate for non-monetary objectives is extremely difficult to quantify, involving economic theory, empirical observation and ethical choices.¹⁴⁸⁰ Development of specific formulae for discounting each relevant objective is technical and goes beyond the scope of this work;¹⁴⁸¹ but the Commission needs to take a stance on the economic and ethical choices; develop guidelines of how it will discount in the balance, and whether this is always appropriate. If we are not careful, considerable uncertainty may be generated. And yet, to ignore this effect could have serious consequences on resource allocation in the future in general, and sustainability in particular.¹⁴⁸²

3.4 Appreciability

Is there an acceptable way of reducing the number of objectives that one needs to consider in the balance? We saw above that we might ignore objectives that were *unlikely* to be achieved. In addition, where an objective will be affected but is not relevant *to any important degree* then the benefits of clarity may outweigh the benefits of perfection.¹⁴⁸³

The Commission, with the support of the Community Courts,¹⁴⁸⁴ already uses this type of limitation in relation to the article 81(1) objective(s).¹⁴⁸⁵ In its *De Minimis Notice* the Commission states that where the parties' aggregate market share is below a certain level, paragraphs 7 and 9, it will not normally, paragraph 8, find that an agreement between them appreciably affects competition. These market share tests are primarily designed to assess

¹⁴⁸⁰ Pearson (2000), pages 77 and 78. The discount rate is (potentially) different for each commodity. As it is different from monetary discounting, one does not overcome this problem by use of the common meter. For example, if one wants to value a future risk of environmental harm (at time T), it would not be appropriate to change the present day value of the environmental harm into monetary form (imagine it was worth £X) and then find the value of £X at T. This is because the valuation discounts for monetary and not environmental future risks.

¹⁴⁸¹ As regards the environment see, for example, Pearce and Turner (1990), Chapter 14; Pearson (2000), Chapter 4; Broome (1999), section 4.6 and Lomborg (2004).

¹⁴⁸² Article 6 of the Treaty reads "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in article 3, in particular with a view to promoting sustainable development." Similar principles have been 'found' in other Treaty objectives, in relation to culture see <http://www.cordis.lu/eesd/ka4/home.html>; for other policies see COM(2001) 264.

¹⁴⁸³ By not considering all the objectives our final decision will not perfectly reflect the meta-objective but judgment is easier, cheaper and can be taken more quickly. The Commission points to this trade-off when using impact assessments in its decision-making, COM(2002) 275, pages 3 and 4. SEC(93) 785/5, page 5, says that when other policies have a significant impact on environmental protection then this must be justified. This implies a similar (although less sensitive) notion.

¹⁴⁸⁴ Case 5/69 *Franz Volk v. Vervaecke*, paragraphs 5/7 and Case 22/71, *Béguelin Import v. GL*, paragraph 16.

¹⁴⁸⁵ It also uses it more generally in its impact assessments, COM(2002) 276, page 16.

whether an agreement significantly contributes to closing off the markets at issue.¹⁴⁸⁶ This is probably being assessed in order to establish whether or not market integration or economic freedom/ efficiency is significantly affected. This is a quantitative test.

There also appears to be a qualitative part to the test. The Commission says, paragraph 11, that the above does not apply to agreements containing certain hardcore restrictions, such as price-fixing and limiting output. The *de minimis* doctrine can still apply where there are hardcore restraints, it is just that its presence cannot be presumed where hardcore restrictions are present.¹⁴⁸⁷

Similar principles could be created for other Treaty objectives (or certain aspects of them¹⁴⁸⁸).¹⁴⁸⁹ The Commission could publish block exemptions and/or, notices, setting out both qualitative and quantitative tests. The Commission should define core areas of each objective; later Treaty amendments could incorporate these. This is also important in relation to weight in the balance, see above. These areas should contain only the parts of each aim that the Commission considers absolutely vital. Some objectives, particularly those where a high standard is demanded, will contain many such areas. For example, in relation to public health, all areas relating to life-saving techniques may be hardcore. Other objectives, such as culture, may contain none.

Once the Commission has defined these hardcore areas it must establish a quantitative test. Insofar as an agreement impacts upon a non-hardcore part of a specific objective then only appreciable effects on that aim will be considered in the balance. The Commission must define the appreciable concept in its guidance.

For example, in the area of environmental protection, it might be felt that the effects of CO₂ emissions would be non-hardcore. The Commission may then decide that an agreement that would lead to, for example, less than 20 tons of such emissions per year would be *de minimis*. It would then ignore environmental policy in the balance in relation to agreements that caused annual emissions of less than 20 tons. Environmental policy would normally be a factor in the balance for agreements that created more pollution than this.

¹⁴⁸⁶ Case T-77/94, *Vereniging van Groothandelaren v. Commission*, paragraph 140.

¹⁴⁸⁷ See, for example, Case 5/69 *Franz Völk v. Vervaecke*, paragraphs 5/7.

¹⁴⁸⁸ For example, there may be three cultural issues, but one may be so much less important than the other two that it can safely be ignored without significantly affecting the robustness of our conclusions.

¹⁴⁸⁹ This should only be done once the objectives are rendered comparable. Lack of appreciability is a relative concept and can only be assessed against other actors of its kind, D'Agostino (2003), pages 91, 92 and 95.

However, as with the *de minimis* concept as currently employed,¹⁴⁹⁰ where an agreement went over this level (over 20 tons of emissions) it could still be *de minimis*, when placed in its legal and economic context. Alternatively, it might also be that, even where the effects under one or more Treaty objectives were not appreciable, their cumulative effect might be such that, taken together, they should be weighed in the balance.¹⁴⁹¹

Furthermore, this concept should also apply in the area of hardcore restrictions as long as, taking into account the legal and economic context, the effect was in fact *de minimis*. Even if such an effect were found not to be *de minimis*, small effects may not be given much weight in the balance, see above.

Another mechanism may also contribute to the reduction of which Treaty objectives should be included in the balance. Chapter Seven, in the part discussing indispensability, argues that only restrictions which achieve some Treaty aim, where that aim cannot be achieved more effectively in any other way should be exempted. However, if an agreement could help achieve four Treaty objectives, A-D, in a non *de minimis* way, and where two of these objectives, A and B, could be more effectively achieved by, for example, State aid, then only objectives C and D should be considered in the balance. If this interpretation of article 81(3)(a) were accepted, it would significantly reduce the factors to be considered in the balancing process and thus the complications inherent within it.

3.5 Conclusion of Section 3

If the Commission is to assure the uniformity of article 81 decisions it must explain what factors affect the objectives' weight in the balance. This part has examined difficulties associated with ascertaining the qualitative and quantitative weight. It also looks at issues, such as discounting and likelihood of achievement, which the Commission ought to account for, as well as explaining how to do this. Other factors, such as the irreversibility,¹⁴⁹² and the duration,¹⁴⁹³ of the harm might also be considered. Finally, we suggest simplifying the balance by ignoring non-appreciable objectives. There is still much work for the Commission to do. These suggestions must be worked into a practical political framework. In part this can be communicated via induction, but guidelines are far more appropriate for a major change/ clarification such as this.

¹⁴⁹⁰ See, Cases C-215/96 and C-216/96, *Carlo Bagnasco v. Banca Popolare di Novara*, paragraphs 34 and 35.

¹⁴⁹¹ This point is similar to the effect which paragraph 8 of the *De Minimis Notice* seeks to prevent. Cumulative impacts are considered in relation to environmental impact assessments, see, for example, Commission, *A Handbook on Environmental Assessment*, page 50.

¹⁴⁹² See, Commission, *Article 81(3) Guidelines*, paragraph 45. This issue is mentioned in relation to impact assessments in general, COM(2002) 276, page 16 and environmental ones in particular, European Parliament and Council, *on the assessment of the effects of certain plans and programmes on the environment*, Annex II.

¹⁴⁹³ See, European Parliament and Council, *on the assessment of the effects of certain plans and programmes on the environment*, Annex II.

4. COMPARING APPLES AND PEARS - A COMMON METER?

There is a practical problem at the balance's core. Once we have calculated each objective's weight, we must weigh it in the balance with the others. This is the third step in Alexy's process, see above. As Aleinikoff notes, the problem for balancing:¹⁴⁹⁴

"...is the derivation of the scale needed to translate the value of interests into a common currency for comparison."

Balancing involves summing the weighted averages (accounting for the qualitative and quantitative aspects, see Section 3) of the relevant objectives.¹⁴⁹⁵ Summing is only possible if the relevant objectives can be substituted for one another (are comparable).¹⁴⁹⁶ Absent substitutability we cannot rationally establish which combination of objectives has the greatest weight; and so, we cannot decide which side of the balance should prevail.

Are the relevant objectives substitutable? Some of them are, sometimes. Chapter Three asked what market integration means. The Commission has defined economic efficiency as a product of market integration. It said, for example, that agreements which undermine market integration "...hold back the improvement in the economic efficiency of the Community's production structure..."¹⁴⁹⁷ It may be that market integration can be defined *in terms of* economic efficiency. That said, we saw that the Commission does not exclusively define market integration in efficiency terms. There may not always be substitutability. In any event, Chapter Two established that many other objectives, such as, culture (article of the 151(4) of the Treaty) and public health (article 152(1) of the Treaty), are relevant in article 81. Imagine an agreement that undermines public health and yet promotes culture. We cannot directly compare these objectives, they are not substitutable. So how can we rationally balance them?

Fortunately, comparability can also arise by means of an indirect scale.¹⁴⁹⁸ We can directly compare 2 and 3, they are both natural numbers, and thus substitutable, ($2 < 3$). In contrast, we cannot directly establish whether 2 apples $<$ 3 pears. Apples and pears are not directly comparable; there is no direct rate of substitution. However, given a common meter (common denominator), such that 1 apple is equivalent to 3 bananas, and 1 pear is equivalent to 5 bananas, for example, then we can easily show that:

¹⁴⁹⁴ Aleinikoff (1987), pages 973 and 976.

¹⁴⁹⁵ Schick (1997), page 42.

¹⁴⁹⁶ Lucy (1999), pages 154-156; Schick (1997), pages 41-44 and D'Agostino (2003), page 28.

¹⁴⁹⁷ Commission, *RCP 1992*, paragraph 2.

¹⁴⁹⁸ Johansson (1991), page 111 and Wathern (1988), page 14.

1 apple = 3 bananas	1 pear = 5 bananas
1 banana = 1/3 apple	1 banana = 1/5 pear
⇒ 1/5 pear = 1/3 apple	
⇒ 1 apple = 3/5 pear	
⇒ 2 apples = 6/5 pear	
⇒ 2 apples < 3 pears	

The common denominator enables us to overcome the *direct* incommensurability problem. As a result, apples and pears become comparable.

If disparate factors, such as economic efficiency, culture and public health, are to be balanced against each other, outside of the market mechanism, then we need an indirect meter, into which all of them can be converted. Otherwise, these objectives cannot be compared, as the Community Courts' interpretation of article 81 demands.

Selecting (and using) a common meter is not a value-neutral exercise.¹⁴⁹⁹ Therefore, it is vital that the Commission is explicit about *what* the common meter is and *how* to convert different objectives into it. This will introduce transparency (and thus enhance repeatability) into the decision-making process. Otherwise, the decision-makers' differing political and social outlooks will generate diverse judgments (balances) throughout the Community. This is particularly problematic since 1 May 2004, now that there are many more decision-makers from a plethora of backgrounds, with much less experience of applying article 81. Diverse judgments will not produce the desired level of uniformity under article 81.¹⁵⁰⁰

The indirect method of comparability allows us to assign a value for the amount of damage/benefit attained (both qualitatively and quantitatively). Using environmental protection as our example, we illustrate this process below. Once a comparable value has been established for all relevant objectives, the values can be added/ subtracted, as appropriate, to ascertain which side of the balance is weightier.

How can one translate the requisite amount of environmental harm onto a common scale? Another way of saying this is what numerical value should we give X amount of environmental harm on the meter? Remember, harm has both a quantitative and a qualitative dimension.¹⁵⁰¹ Examining the quantitative dimension first, article 174(2) of the Treaty explains that:

"Community policy on the environment...shall be based on...the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

¹⁴⁹⁹ Espeland and Stevens (1998), page 317, 323-326 and 330-332 and D'Agostino (2003), pages 9-14 and Section 21.

¹⁵⁰⁰ This could be positive, leading to competition for the 'best' mix of objectives, D'Agostino (2003), pages 14, 15, 137 and 138. But the Council has not chosen this model of competition, Regulation 1/2003, articles 10 and 16.

¹⁵⁰¹ As discussed in Section 3 above, it should also account for issues such as the likelihood of damage and when damage will occur, but I do not consider them here as they unnecessarily complicate the analysis for our purposes.

Article 174(2) gives us a clue as to how to evaluate the quantitative aspect of environmental damage. The polluter should pay. We could assess, quantitatively, how much environmental damage has been/ will be done by asking how much it would cost the polluter to sort it out. Money could be the common meter.

Would money be a good meter? Yes. It is readily divisible, and thus, flexible. Furthermore, the Community institutions, the Member States and undertakings are already familiar with using money for balancing. Member States, and the Community itself, must decide how much of the EU budget is to be spent on the different policy areas. Individuals are also used to balancing such disparate decisions as whether to buy oranges or medical insurance, houses or education, using the money they earn. This familiarity with money could also be a disadvantage, however. We must ensure that our intimacy does not blind us to some of the assumptions that its use involves. See, the Commission decision, *CECED* (2000) discussed below. That said, on balance money is a good scale to use.

Note that environmental protection's conversion to the common meter is already riddled with value judgments. The polluter must pay, but is this the most effective/ best/ cheapest way to reduce environmental harm? Is this relevant? A second problem relates to what we mean by 'we could ask how much it would cost the polluter to *sort the environmental damage out*'? Article 174(2) implicitly prioritises at least two approaches to environmental harm. Rectifying the damage at source is a priority (Option A). Alternatively, the polluter should clear up the environmental damage that has occurred (Option B). This complicates our analysis somewhat. Imagine that Option A costs £90 and Option B costs £50.¹⁵⁰² Which is better? The Treaty ranks these options in order of preference, but it does not tell us *how much more preferable* Option A is than Option B. In this example, we assume that the best strategy, taking account of both price and the Treaty's ranking, is to clear up the environmental damage that has occurred, Option B.¹⁵⁰³

We now have the quantitative assessment of the environmental damage caused by our agreement. For the sake of argument, assume that it was £200 (£50 multiplied by the value of the preference for Option B). To establish the objective's weighted average, we multiply £200 with the Commission's qualitative assessment of environmental protection. As discussed in

¹⁵⁰² These assessments should take account of all appreciable direct and indirect costs. In relation to the four different environmental costs, see Johansson (1991), page 114. As regards culture, see Snowball and Antrobus (2001), pages 755 and following.

¹⁵⁰³ No other objectives expressly incorporate the 'polluter pays' principle. The Commission could, as a starting point for the other objectives, compare the position with and without the agreement, a kind of 'the parties pay' principle. The cost of reducing the level of harm to its level before the agreement (or the cost of achieving the same improvement through other means) is the amount of quantitative harm/ benefit provided by the agreement. This might price these objectives too highly. Another possibility would be to use cost-benefit analysis. A final suggestion would be to employ a form of the Neumann/ Morgenstern technique, D'Agostino (2003), pages 97-99.

Section 3.1., the qualitative figure is based upon an abstract value related to the importance of environmental protection, as explained by the Treaty's meta-objective. It *may* also take account of the specific type of environmental damage threatened by the agreement.

Determining the qualitative value is complex, political and somewhat arbitrary exercise. The Commission may determine one figure, or there may be a function that describes an indifference curve between the two (or more) objectives. There are many methodologies that can be used to obtain this sort of information.¹⁵⁰⁴ One is to articulate different levels of gravity of infringement, for each objective (qualitative issue). For example, there could be two categories of 'high' and 'non-high', reflecting the Treaty's own distinction; see Section 3.1., for issues that must be considered if this approach is adopted. Then, the qualitative and quantitative values must be combined.¹⁵⁰⁵

Cost-benefit analysis collapses the qualitative and quantitative steps into one assessment.¹⁵⁰⁶ By assessing people's 'willingness to pay',¹⁵⁰⁷ cost-benefit analysis should automatically account for qualitative and quantitative weight, as well as discounting.¹⁵⁰⁸ The same applies to pricing through the market.

It has been suggested that cost-benefit solutions (including internalising externalities) are the most appropriate means to account for other objectives.¹⁵⁰⁹ However, the qualitative values adopted are those of the individual. These might differ from the qualitative weight that the Treaty (or the Commission) assigns; for example, due to a lack of information, different priorities, or externalities. The individual might also assess the importance of the impact of his/her decision on others differently than the Treaty.¹⁵¹⁰ For example, she might not take 'sufficient' account of the environmental damage that she creates for future generations when driving her car, as this will not affect her.¹⁵¹¹ As a result, cost-benefit analysis might not always give the 'right' qualitative weight.¹⁵¹²

¹⁵⁰⁴ D'Agostino (2003), pages 99 and 100 and Dasgupta (2001), pages C4-C13 and references made there. In relation to the environment, see, for example, Sinden and Thampapillai (1995). As regards Community initiatives see, for example, COM(2002) 276, pages 15 and 16.

¹⁵⁰⁵ Once again split into different degrees of seriousness. For more accuracy a list of aggravating and attenuating factors could also be added, see, for example, Commission, *Fining Guidelines*.

¹⁵⁰⁶ See, Adler and Posner (1999), pages 197-204.

¹⁵⁰⁷ See, for example, Commission, *Cost-benefit analysis of MSWs*, pages 269.

¹⁵⁰⁸ See, Broome (1999), page 57.

¹⁵⁰⁹ See, Gyselen (1994), page 244 and Chapters One and Part C.

¹⁵¹⁰ See, for example, the Economic and Social Committee, *Comments on COM(1999) 543*, paragraph 3.3. and Majone (2002), page 101.

¹⁵¹¹ Broome (1999), page 51. For example, in *The Sixth Environment Action Programme* (2001), paragraph 1, the Commission says: "A clean and healthy environment is part and parcel of the prosperity and quality of life that we desire for ourselves now *and for our children in the future*. [my emphasis]"

Many methods aim to improve the assessment of the qualitative element.¹⁵¹³ Further work needs to be done in valuing these objectives.¹⁵¹⁴ The Community is already considering this issue in a number of policy areas.¹⁵¹⁵ The Commission should explain how it goes about this process in its article 81 decisions. It should also explain when cost-benefit analysis is appropriate and when it is not.

There is very little evidence of the Commission using meters in its article 81 analysis. Yet, direct balancing is not possible for comparing all objectives, see above. We suggest using money as a meter. There are other alternatives. The meter might even change, depending upon the objectives at stake. The Commission must provide guidance on which common meter(s) to use and how to translate the objectives into them. One decision where the Commission embarks upon this process is Commission decision, *CECED*. For a description of the facts, see Chapter Two.

There, the Commission focused on the agreement's economic benefits to consumers. It argued that the increase in the purchase price for these environmentally friendly machines would be compensated for by savings on electricity bills, paragraph 52. The Commission added that there were also collective environmental benefits.¹⁵¹⁶ It highlighted article 174 of the Treaty, paragraph 55, and added:

"Agreements like *CECED*'s must yield economic benefits outweighing their costs and be compatible with competition rules..."

What are 'economic benefits'?¹⁵¹⁷ The Commission said that these could include the costs of pollution.¹⁵¹⁸ It discussed the cost, to society, of avoiding the carbon dioxide and sulphur dioxide emissions, which the increased energy efficiency would obviate and said, paragraph 56:

¹⁵¹² This is hinted at by Poiars Maduro (1999) pages 466 and 470.

¹⁵¹³ See the discussion in Commission, *Case studies on strategic environmental assessment*, Volume 1, pages 39-41; Commission, *Cost-benefit analysis of MSWs*, pages 269, Annex I and Johansson (1991).

¹⁵¹⁴ The Commission makes this point, for example, in COM(2003) 338 (public health and environmental protection), page 17; COM(2002) 714 (industrial policy), pages 3 and 28 and COM(2001) 486 (consumer protection), pages 19 and 19.

¹⁵¹⁵ For example, in relation to public health and the environment, COM(2003) 338, page 17.

¹⁵¹⁶ The Commission followed a similar approach both in relation to the EACEM Agreement, see Commission, *RCP 1998*, paragraph 130 and page 152, and in the Annex to COM(95) 689, where the Commission made a preliminary assessment of the costs and the benefits of technical measures to reduce CO₂ emissions from cars.

¹⁵¹⁷ This term is discussed in Chapter Four, which concluded that it was referring to a financial way of assessing environmental harm.

¹⁵¹⁸ See, Chapter Four of this thesis.

"On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines."

Taking its base point as what would have happened absent the agreement, the Commission found that the environmental benefits to society were seven times greater as a result of the agreement. This is the same base point that we suggest above. The Commission concluded that the expected improvements to energy efficiency, the cost-benefit ratio of the standard and the return on investment for individual users, implied that the agreement would contribute significantly to technical and economic progress, paragraph 57.

In conclusion, the Commission found that individual users' return on investment meant that, although the initial purchase price would rise, the lifetime cost of the machine would likely fall. It also found that the cost of avoiding the pollution that would arise if the agreement were not adopted would be seven times that of the increased purchase price of the more energy-efficient machines.

In order to compare the environmental improvements with the initial loss of consumer welfare the Commission used a common meter. The meter it chose was money. The inclusion of a common meter is an important first step. However, while the Commission took account of the quantitative dimension of the benefit, it failed to consider the qualitative issue.¹⁵¹⁹ Nor did it discuss whether preventative action were better than cleaning up the damage and account for this in the balance. In fact, it assumed that *all* environmental problems would be fixed *completely*. This prices environmental protection too highly.

A monetary meter is more easily applied to some Treaty objectives, such as environmental protection and economic efficiency, than to those such as economic and social cohesion the effect of which is often particularly hard to quantify in monetary terms. Objectives such as respect for human rights and public health may also be difficult to quantify in this way for political reasons.¹⁵²⁰

Despite the problems highlighted above, we broadly welcome the Commission's use of a meter, at this stage. First, its introduction is an extremely important step, creating the possibility of greater transparency in the area. Secondly, a monetary meter, while not ideal, should be applicable to many of the Treaty objectives that are touched by agreements considered under article 81. Nevertheless, the Commission must use the common meter more consistently and make provision for qualitative analysis too, where appropriate. It must also increase the clarity

¹⁵¹⁹ As noted above, this is only acceptable if the objectives being weighed have the same qualitative values. The Commission also ignores discounting and likelihood.

¹⁵²⁰ Sunstein (1997), pages 235-238.

of its analysis. Furthermore, efforts need to be undertaken to produce a meter or meters in areas where the monetary meter developed above is deemed inappropriate.

5. CONCLUSION OF CHAPTER EIGHT

Many objectives must be considered within article 81. They often conflict. The Commission resolves these conflicts through balancing. The Community Courts support this approach. There is little or no explanation about how such conflicts should be resolved or how balancing should be performed. As a result, article 81 decisions are not predictable for undertakings, nor are Commission decisions reproducible by the Member States' authorities. Guidance in this area would significantly contribute towards the effective enforcement of article 81. Since 1 May 2004, the need for such guidance is even more pressing.

For this reason we proffer this framework. The Commission should produce *Guidelines on Weighing*, providing a framework for balancing, either accepting ours or suggesting a new one. These guidelines should allocate an abstract (qualitative) value for each relevant objective, or at least the important ones that are frequently cited. This would introduce a more mechanised approach to balancing; which, while remaining sensitive to the demands of the Treaty should make the prediction of the balance, and, ultimately, decision-making, simpler.¹⁵²¹ These abstract values will be somewhat arbitrary. But transparency demands that they be assigned. Due to the political importance of setting such weights, the Member States may consider defining this in future Treaty amendments. In concrete cases, this must be combined with the quantitative harm (or benefit) attained by the agreement. We demonstrated how this might be done in relation to environmental protection. Different rules may apply to other objectives and the Commission should clarify this procedure in relation to at least the major ones.

The Commission must also explain which factors theoretically affect the objectives' weight. Likelihood of harm is relevant, as is discounting for the future. The Commission should explain how these concepts can be calculated and provide examples in relation to the important article 81 objectives. It should also explain how appreciability would apply to objectives in the balance.

Finally, these guidelines should adopt a meta-objective. At first, this will probably be too general to provide much help. That said, it is still important and decision makers will refer to it when, after having allocated values to the relevant objectives in the case before them, they remain unsure about how specific conflicts should be decided. Over time, case law will help define the content of the meta-objective and increasingly decisions will be made relying directly upon it.

¹⁵²¹ Espeland and Stevens (1998), page 314.

The Commission will continue to adopt block exemptions.¹⁵²² It could also consider issuing them to help clarify the balancing exercise. Lenz suggests that the Commission may not have sufficient experience to produce an environmental agreements block exemption.¹⁵²³ That conclusion might be questioned, when the Commission's experience of balancing under article 81 is examined in relation to other objectives too. Furthermore, block exemptions have already been issued which balance the provision of State aid with Treaty objectives such as employment creation and regional aid.¹⁵²⁴ The Commission could apply this experience when issuing equivalent block exemptions. Producing block exemptions will be difficult,¹⁵²⁵ especially due to the dynamic nature of the balance. But it is important, not only because it will clarify the need for such an exercise in the Commission's statements but also because it will provide a framework within which this exercise can take place. However, due to the plethora of different situations that can arise, it may be better to restrict block exemptions' application to circumstances where the relevant agreement only affects two or three objectives appreciably. This would allow the exemption regulations to be more finely tuned. Guidelines could be used in other instances.

This chapter is not revolutionary. It is not intended to be.¹⁵²⁶ Rather, it has taken concepts that the Commission normally uses in the balance and asked how they will operate in relation to objectives such as public health and environmental protection. It has shown that (i) the application of these concepts to the relevant objectives raises many difficult questions; and, (ii) it demands a plethora of value judgments. As a result, producing guidelines will not be easy. But it is this very difficulty that makes them necessary. Without them, the Member States' courts and competition authorities must struggle with these issues alone. They are inexperienced in applying article 81(3) of the Treaty. Without guidance they will soon become lost, rudderless ships in the night. Nor must they be allowed to shelter in their home ports of nationally influenced value judgments. The Commission must guide them out of this darkness, towards the light of the optimal Community balance's dawn.

¹⁵²² Regulation 1/2003, recital 10 and article 29.

¹⁵²³ Lenz (2000), pages 60-62.

¹⁵²⁴ See, http://europa.eu.int/comm/competition/state_aid/legislation/aid3.html#Regulation1 for some examples.

¹⁵²⁵ This, the Council noted, involved "...factual, legal and economic issues of a very complex nature and great variety in a constantly evolving environment..." Council Regulation, *Horizontal State Aid*, recital 11.

¹⁵²⁶ Although it is certainly less developed than I would have liked, due to the lack of detailed discussion of these issues in relation to article 81 of the Treaty.

CONCLUSION OF PART C

Non-economic objectives can conflict with antitrust's economic goals. Chapter Two argues that the Treaty favours compromise over exclusion. This is particularly the case in articles which specifically provide a balancing mechanism. One such article is article 81 of the Treaty. This is not lost on the Commission, which has often balanced non-economic objectives there.

Part B asks how the Commission conducts its article 81 balancing. There is little order or consistency. Sometimes it (and the Community Courts) balances in article 81(1) of the Treaty, sometimes in article 81(3), and sometimes it claims that it cannot balance within article 81 at all. Part B posed a series of questions that must be answered before the consideration of non-economic objectives within article 81 can be considered even remotely transparent. Until then, few claims can be made to the maturity of Community competition policy either.

In light of Part B's observations, Part C makes a series of proposals for the consideration of non-economic objectives within article 81 of the Treaty. We said that certain elements must be at the heart of any proposed changes:

- the decision-maker must be able to take account of the various relevant objectives within article 81;
- businesses, decision-makers and consumers need clarity and transparency; and,
- the proposed system must respect the Treaty, unless amendments are proposed.

Chapter Six makes two recommendations. First, it proposes an economic efficiency test, as the basis of article 81(1) of the Treaty. Secondly, it argues that non-economic considerations should be exclusively considered under article 81(3) of the Treaty. While non-economic objectives must be considered within article 81, this does not mean that they should be directly considered all of the time. This would create too much uncertainty and involve too much cost, for insufficient return.

Chapter Six recommends clarifying and simplifying article 81(1). The current test is too wide and unclear. This imposes enormous costs on business and society as a whole. The justifications for these costs are unpersuasive, especially today when the benefits of competition and the need for antitrust laws is understood and accepted throughout the Community. Adopting an economic efficiency test would introduce more transparency and clarity. Furthermore, Chapter One showed that an economic efficiency test often helps achieve other relevant non-economic objectives, in the long term. Having said that, it would not take account of all of these, nor could it be guaranteed to give them the weight that the Treaty demands. This should not be too prejudicial as most of these non-economic objectives can be more efficiently promoted through

other instruments. In any event, article 81(3) of the Treaty is there to ensure that, where necessary, relevant non-economic objectives can be taken into account.

Chapter Seven makes a series of recommendations for article 81(3) of the Treaty. As regards the first test in article 81(3) it suggests a full balancing exercise; which should include consideration of Member States' interests, in cases of diagonal conflict. It goes on to recommend the deletion of the second and fourth article 81(3) conditions. They are either irrelevant or undermine the balance that is struck in the first article 81(3) test. The outcome of the above is that while efficient agreements would be cleared within article 81(1) of the Treaty, agreements that fail this test can be exempted where they promote relevant non-economic objectives. This is in line with the articles 2-4 of the Treaty and the various policy-linking clauses. Such compromise could create a massive distortion of competition, even where these ends could better be achieved by other means. For this reason, we suggest re-defining article 81(3)(a). This would essentially mean that only where an objective could not be achieved in any way (to the appropriate level) more efficiently than by distorting competition would it be exempted. This does not mean that we believe that non-economic objectives are unimportant. Quite the contrary. However, it is hoped that this will preserve the market mechanism as the fundamental tool of wealth creation because of its many advantages. At the same time, it will encourage the use of the most efficient tool to achieve Treaty objectives. This can be through distortions of competition where necessary.

Finally, Chapter Eight provides a framework for balancing non-economic objectives within article 81 of the Treaty, under article 81(3)'s first test. The Commission has not provided such a guide. It must do so either by adopting our guidelines, or by proposing its own. We consider the weight of non-economic objectives. Although we do not assign specific values, the Commission must provide them, as well as explaining how they can be compared and combined. It must also explain what other factors could hypothetically affect an objective's weight in the balance. We discuss issues such as the likelihood of harm and discounting for future effects. The Commission must also deal with appreciability for non-economic objectives. Finally, it must provide an appropriate meta-objective for balancing under article 81 of the Treaty. Chapter Eight offers suggestions in all of these areas. Producing such guidelines is not going to be easy. It is precisely this that makes them so necessary.

The Commission's leadership role has been reaffirmed by Regulation 1/2003. This brings with it a certain responsibility. Commission, *Article 81(3) Guidelines* have injected a welcome transparency into its article 81 decision-making. However, other than accepting that non-economic objectives are relevant under article 81(3) of the Treaty (they do not discuss the

*Wouters Case*¹⁵²⁷) these guidelines offer no guidance about how this should be done. Part C has tried to establish the foundations of compromise here.

Finally, Part C also suggested certain amendments to article 81 of the Treaty. These solely focus on the balancing of non-economic objectives within this provision and do not consider other relevant changes which might be made, to the jurisdictional test, for example. Those changes we have recommended are brought together here:

Article 81

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition¹⁵²⁸ within the common market.¹⁵²⁹
2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
3. The provisions of paragraph 1 are¹⁵³⁰ inapplicable in the case of:¹⁵³¹
 - any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,

whose overall Member State and Community public policy benefits¹⁵³² outweigh the negative effects on competition,¹⁵³³ and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives.¹⁵³⁴

The overwhelming majority of commentators reject changing the Treaty.¹⁵³⁵ This is unfortunate. Given the seismic changes in the Treaty since 1957, we believe that a re-clarification at this stage would be helpful. Non-economic objectives have been important in article 81. They are

¹⁵²⁷ Although Commission, *Article 81(3) Guidelines*, paragraph 18(2), probably hint at a similar point.

¹⁵²⁸ The reference to competition has been left unchanged, on the condition that the Community Courts make it clear that this refers to economic efficiency. Chapter Six argued that this was preferable, as we may welcome the flexibility of the 'competition' reference if changes need to be made in the future.

¹⁵²⁹ As recommended by Chapter Six, we have removed the five examples of restrictions of competition.

¹⁵³⁰ The language has been changed from 'may' to 'is', to reflect the fact that the article 81(3) tests are exhaustive. There are now only two article 81(3) conditions, as opposed to the original four.

¹⁵³¹ In his seminal article in this area, Monti suggested adding a new article 81(4) for the consideration of non-economic objectives, Monti (2002), pages 1097. We believe they can be (and have been) adequately dealt with under article 81(3) of the Treaty. For this reason we have not followed him here.

¹⁵³² This change emphasises the wide nature of the first test as well as the fact that both Community and Member States objectives can be considered there. It also explains that 'overall' benefits are what count. As a result, where the agreement undermines the achievement of relevant objectives this can be taken into account.

¹⁵³³ This expressly states that any benefits found under the first conditions must be weighed against the negative effects caused by the restriction of competition in article 81(1) of the Treaty.

¹⁵³⁴ The wording of the second condition is the same as that in article 81(3)(a), but it has the new meaning proposed in Chapter Seven.

¹⁵³⁵ Monti (2002), page 1099 and Ehlermann (2001).

becoming more so. This is an issue that will not go away. It must be dealt with. And soon. A lot could be achieved through reinterpretation of article 81's existing provisions. But, we have argued, that some are no longer necessary and, in any event, without Treaty reform it is more difficult to predict how the Community Courts will respond to change.¹⁵³⁶

¹⁵³⁶ Kirchner (1998), page 519.

THESIS CONCLUSION

This thesis discussed public policy's place in article 81 of the Treaty. It demonstrated that public policy considerations are relevant within that provision. It also suggested how and where they should be considered there.

The thesis is basically in three parts. Part A discussed whether non-economic (public policy) objectives should be considered in article 81 of the Treaty. While the Commission accepts that they might be, the leeway for this is seriously restricted. Commission, *Article 81(3) Guidelines* state that:

"The objective of article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."¹⁵³⁷

Many influential Community competition scholars and practitioners would agree. An oft-cited reason is that public policy objectives are increasingly irrelevant in other jurisdictions' competition provisions (including those of the USA, although this is debateable). By following a similar policy in the Community we could reduce costs for multinational firms. Furthermore, competition policy cannot achieve everything. Non-economic goals can normally be better achieved using other policy instruments. Chapter One looked at these and other claims. It concluded that, from a theoretical perspective and outside of the Treaty framework, one might reasonably conclude that:

"All policy objectives cannot (and should not) be 'regulated' through competition policy...Often competition law is entirely inappropriate for that purpose (or other policy tools are much more efficient). Indeed, where competition policy pursues a consumer welfare standard it is often better to ignore non-economic policy objectives when implementing the competition law...However, this robust conclusion should be reconsidered where the benefits that enhanced legal certainty brings are outweighed by the importance of the policy goals at stake and these interests: (i) cannot be protected through alternative legislation (either in fact or for jurisdictional reasons); or (ii) have not actually been protected by alternative legislative tools."

Nevertheless, Chapter Two shows why this kind of argumentation is inappropriate in a Community competition law context:

"Both the structure of the Treaty and the presence of the policy-linking clauses create the possibility of conflicts in Community law. The Treaty normally prefers compromise, but sometimes it is silent. The Community Courts have had to fill these gaps. While doing so, they had to choose between exclusion and compromise. In the vast majority of cases, including those related to article 81, they have chosen compromise."

When the Community Courts construe particular articles of the Treaty they have regard to the framework of the Treaty as a whole, to its general principles, to the tasks and activities which the Treaty prescribes for the Community. Article 81 (and competition policy as a whole) is not an end in itself but rather one of the instruments for achieving the fundamental goals laid out in

¹⁵³⁷ Commission, *Article 81(3) Guidelines*, paragraph 13.

the Treaty. Community competition provisions cannot be understood or applied without reference to this legal, economic, political and social context. There is a growing tendency among Community competition specialists to treat their topic in a highly technical way, as distinct from Community law as a whole. This is inappropriate. Back in 1966 the ECJ held:

"Article 85 [now article 81] as a whole should be read in the context of the provisions of the preamble to the Treaty which clarify it and reference should particularly be made to those relating to 'the elimination of barriers' and to 'fair competition' both of which are necessary for bringing about a single market."¹⁵³⁸

The Treaty (and our understanding of it) has changed fundamentally since the 1960s. The single market has largely been achieved;¹⁵³⁹ and the gradual process of building this has pushed the Community into ever-wider policy fields. The signing of the Single European Act, the Maastricht Treaty and the Amsterdam Treaty (as well as the more recent European Convention) have transformed the legal, economic, political and social context in which the Community now operates. It is no longer an economic community; it is much more than that. As a result, it is little surprise that the CFI has more recently held that:

"...in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under article 85(3) [now article 81(3)] of the Treaty."¹⁵⁴⁰

This statement has also received support from the European Parliament and the Council. The Commission's position is more complex. Chapter Two said that the Commission:

"...is creating a lot of ambiguity by publicly implying that public policy concerns are irrelevant in article 81 decision-making. The Commission is not able to make such a policy change as it is bound by the Treaty and the Community Courts' judgments. That said, the Commission has considerable discretion about how to balance different values within article 81...It is acceptable for the Commission to focus on economic analysis within article 81; however, this must be tempered by other approaches where this does not adequately take account of other relevant objectives.

In practice the Commission seems to be following the Community Courts' lead in its decisions. Many objectives are regularly considered within article 81..."

This conclusion is foundational. Most Community lawyers would readily accept it. Many Community competition lawyers would be surprised. This is important. The consideration of non-economic objectives within article 81 can fundamentally alter that provision's assessment; which could affect the agreement's status under article 81(2) of the Treaty. Today, this issue is in need of particular attention, because of:

¹⁵³⁸ Case 32/65 *Italy v. Council and Commission* [1966], page 405.

¹⁵³⁹ As a result of the enlargement process of 1 May 2004, this may no longer be so throughout the Community.

¹⁵⁴⁰ Joined Cases T-528/93, etc., *Métropole Télévision v. Commission* [1996], paragraph 118.

- the recent introduction of Regulation 1/2003;
- the enlargement on 1 May 2004; and,
- the appointment in November 2004 of the new Commissioner for Competition.

Once it is accepted that non-economic objectives can be relevant in article 81 decisions, one naturally asks how and where these objectives are considered and what the limit of the balance is. Part B discussed the Commission's current practice. There is little or no transparency. The fact that balancing occurs at all is rarely acknowledged openly. Non-economic objectives have been considered in both article 81(1) and 81(3) of the Treaty, see Chapters Three and Four. There is no discussion about when one provision should be preferred over the other. Furthermore, Chapter Five says that:

"The mechanism that the Commission adopts when balancing is unclear and thus not repeatable, by undertakings, their lawyers, or the Member States' courts and competition authorities."

Finally, the limits of the balance are uncertain. Firm conclusions are hampered by the lack of formal, transparent, decisions. But, in fact, in Commission decisions, when public policy objectives were considered relevant, they always seem to tilt the balance in its favour, i.e. public policy 'wins' the compromise. This is not in line with either the Commission's recent policy statements or the perceived wisdom in the doctrine.

The state of the law in this area is pitiable. This is particularly so given the quantity of formal Commission decisions where non-economic objectives have been considered, and even played a decisive role. The recent decentralisation of article 81 and 82 enforcement, appears:

"...to assume that the system's goals are well-defined and thus that those who will make decisions in the modified system can easily identify and follow them. The history of competition law in Europe suggests otherwise."¹⁵⁴¹

Significant fault must be laid at the Commission's door here. However, others are also to blame. Community competition lawyers must consider all relevant objectives within their competition assessments. To do otherwise would be a disservice to their clients. The Member States should have provided a clearer, more coherent, system for dealing with such conflicts in the Treaty. Amendment of article 81, for example, could have clarified where and when specific objectives should be considered. The relevant weight of the various objectives could also have been discussed more clearly. On top of this, the Community Courts should reach internal agreement on how public policy should be incorporated into article 81.¹⁵⁴² One solution to this issue is for the Member States, under article 239 of the Treaty, to submit a dispute to the ECJ about the

¹⁵⁴¹ Gerber (2001), page 125.

¹⁵⁴² One can only assume that such agreement is lacking, compare the *Wouters Case*, paragraph 97 and Case T-112/99 *Métropole télévision (M6) and Others v. Commission* [2001], paragraphs 76 and 77, see Chapter Six.

precise scope of article 81. Alternatively, the Community Courts could themselves rule on this issue, if an appropriate case comes before them via another route.

Part C makes a series of proposals on how and where to consider non-economic objectives within article 81 of the Treaty. These suggestions try to take account of the Treaty's imperative to consider public policy within this provision, while injecting sufficient transparency, such that this process is both predictable and repeatable.¹⁵⁴³ It also seeks to take into account, to the extent allowed by the Treaty, Chapter One's conclusions. To this end, clear and consistent statements are required by the Community Courts on the following issues:

- the notion of 'competition' under article 81(1) refers to economic efficiency;¹⁵⁴⁴
- that non-economic objectives are irrelevant in article 81(1) of the Treaty;¹⁵⁴⁵
- under article 81(3) of the Treaty:¹⁵⁴⁶
 - the first test should involve:
 - a full balancing (i.e. considering positive and negative effects) of Community public policy objectives. Member States' public policy objectives should also be considered in cases of diagonal conflict;
 - consideration of these objectives, even in cases between private parties, whether before the Commission, or a Member State court or competition authority;
 - consideration of all appreciable effects, even those outside the relevant market;
 - article 81(3)(a) should be re-interpreted to mean that the agreement must be indispensable, in the way described in Chapter Seven. This would essentially mean that only where an objective could not be achieved in any way (to the appropriate level) more efficiently than by distorting competition would the agreement be exempted; and,
 - that the agreements' aim is irrelevant under article 81(3) of the Treaty.

¹⁵⁴³ They are also made in the awareness that the Community is part of a global trading system. The Treaty's aims will more likely be achieved where the increasingly global nature of commerce is recognised. To this end, the proposals open the way for more convergence with US antitrust than we have seen in the past. Nevertheless, although the consideration of non-economic objectives reduces convergence (Ehlermann (1998), page xi), the Treaty's imperative for this cannot be ignored.

¹⁵⁴⁴ See Chapter Six.

¹⁵⁴⁵ See Chapter Six. The Community Courts can limit the temporal effects of their judgments on certain conditions, see Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL and Others v. Jean-Marc Bosman* [1995], paragraph 77. It may be appropriate to do this for market integration as regards trade with the Member States that joined on 1 May 2004.

¹⁵⁴⁶ See Chapter Seven.

The Commission should then, once it arrives at a clear and consistent internal position, produce guidelines:

- to clarify the scope of, at least the most important, objectives (including the definition of economic efficiency¹⁵⁴⁷);
- to explain why these objectives are pursued, so that it is clearer when conflicts arise between them;¹⁵⁴⁸
- on what considerations are relevant when balancing non-economic objectives under article 81(3)'s first test. This should include:¹⁵⁴⁹
 - provision of a meta-objective;
 - guidance on the qualitative weight of at least the commonly invoked public policy objectives, as well as rules for assessing their quantitative weight (including the relevance of how likely the cost or benefit is to arise, discounting for the future and appreciability); and,
 - rules on how to convert each objective into an indirect, common, meter;
- which provide a clear co-ordination mechanism between the decision-maker, the relevant Director Generals in the Commission and any concerned Member States, when their interests, or those with which they deal, are appreciably affected by an agreement;¹⁵⁵⁰ and,
- to keep all relevant up-to-date, so as to reflect the balance as it changes over time.

¹⁵⁴⁷ See Chapter Six.

¹⁵⁴⁸ See Chapters One and Three.

¹⁵⁴⁹ See Chapter Eight.

¹⁵⁵⁰ Some believe that co-operation is already considerable, Rosenthal (1990), pages 298 and 299. However, there seems to have been a lack of co-ordination between DGs in the past, Buigues, Jacquemin and Sapir (1995a), pages xx and xxi. The same applies between the Community and the Member States, Gual (1995), pages 21 and 31. In this regard certain comments of the European Parliament, as well as the Commission's replies, are instructive: European Parliament, Resolution on the XXVIth report by the Commission on competition policy, reported in Commission, *RCP 1997*, page 368, point 2, the European Parliament "...repeats its call for closer cooperation among the Commission departments concerned, an aim which could be achieved most effectively by setting up a separate department within the Commission to evaluate the costs and benefits - especially in terms of employment - arising when the four above-mentioned policies (competition, industrial, commercial, and internal market policy) are framed and implemented, and to draw up recommendations to the Commission, set out in an annual policy coordination report that should also be submitted to the European Parliament and the Council..." The Commission replied, page 374 "The Commission does not agree with Parliament's view of the need to create a specific structure responsible for coordinating various Union policies. It would point out to Parliament that all significant Commission decisions on competition are prepared through interdepartmental consultations and account is taken of observations made by the directorates-general concerned. Moreover, major decisions concerning competition policy are adopted by the Commission as a collegiate body, where all members are able to bring out the interests of the policies for which they are responsible. Regarding the annual report on the activities of the European Union, this already covers the coordination of various Commission policies." Since decentralisation came into effect on 1 May 2004, not all article 81 decisions are taken by the Commission as a collegiate body.

These guidelines will be difficult to produce. However, it is this difficulty that drives the imperative for them. Finally, the Member States should:

- in the next Treaty revision:
 - explain which Treaty provisions, if any, justify the exclusion of the competition provisions;¹⁵⁵¹
 - provide guidance on the Treaty's meta-objective and explain how public policy objectives should be balanced in general throughout the Treaty's operational provisions;¹⁵⁵²
 - provide more guidance on the qualitative weight to be assigned to objectives in case of conflict between objectives;¹⁵⁵³
 - consider amending article 81, as set out in Part C's Conclusion;¹⁵⁵⁴
 - consider implementing a policy-linking clause for competition; and,
- consider amending Regulation 1/2003, if it is felt that Member States' courts (and possibly even Member States' competition authorities) are not suitable fora for the balance that article 81 demands.

Until this guidance is forthcoming, undertakings would be well advised to seek support for any agreements that might appreciably undermine welfare. We have seen that DG Competition might be slow to advise in such cases. Nevertheless, Part B's Conclusion suggested that where:

"...the parties to an agreement act in accordance with a specific Community law, DG Competition is more willing to accept the non-economic objectives...While it is not necessary to have prior Community support in this way, it clearly helps...

It is also beneficial to get another of the Commission's Directorate-Generals to support the agreement in question."

In other matters the approval of one of the Member States may also have affected the outcome of the balance. Compromise is, and will likely remain, a political process.

In the Introduction we cited Bork:

"Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law - what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."¹⁵⁵⁵

¹⁵⁵¹ Should the *Albany Case* be confirmed, for example, see Chapter Two?

¹⁵⁵² See Chapters Two and Eight.

¹⁵⁵³ See Chapter Eight.

¹⁵⁵⁴ Chapters Six and Seven explain why these amendments should be made.

¹⁵⁵⁵ Bork (1978), page 50.

Unlike in the USA, in the European Union competition policy is incorporated into the Community legal order's constitution. This has an important impact upon how the relevant provisions should be interpreted. The Treaty's structure, the policy-linking clauses, the Community Courts' judgments, the Council, the European Parliament and many Commission decisions all support the consideration of public policy objectives within Community competition policy. As to how, where and the limits of this balancing, there is less agreement. Sauter has written:¹⁵⁵⁶

"As a 'constitutional charter', the Treaty sets out the objectives, principles, policies and institutional provisions of the Community. As an international agreement, however, it did not aim to establish and justify a coherent and independent political structure before a critical polity, or even to resolve conflicts of laws. Successive Treaty amendments have produced only half-hearted attempts at revising its structure. Hence the Treaty does not clearly establish goals, principles and instruments at various levels in an explicit hierarchy of norms and legal acts, as a written constitution would usually do, and the priorities of the Community are difficult to discern. This gives rise to conflicts of interpretation which are repeated with each amendment of the Treaty."

Although the European Convention attempts a more thorough structure revision, it does not confront the main problems highlighted either. The recent Commission, *Article 81(3) Guidelines* are predicated on the idea that the law is clear. We have shown that this is not the case in relation to the consideration of public policy within article 81.

This thesis has suggested how and where to consider public policy within article 81 of the Treaty. The aim has been to help establish a coherent body of substantive rules. In so doing, we have sought to produce a structure that enhances the clarity and predictability of decision-making, as well as the demands of 'globalisation'. At the same time, we wanted to give adequate weight to non-economic goals.

Even if all the recommendations above were implemented, there would not be perfect transparency. Compromise is difficult and can never be entirely predictable. This is not necessarily a problem; certainty is not the only goal. Public policy balancing is not mathematics, as Chapter Eight explains:

"Every case is different and value judgements must be made about the optimal balance *in each case*. The presence of this discretion should be celebrated. Legal certainty is not the only value legal systems espouse. There is also justice and fairness. While the decision-maker should be guided, their hands should not be tied."

There is much (difficult) work to do. We have listed above a number of political and economic tasks that must be undertaken by the Community Courts, the Commission and the Member States in order to provide a minimum level of clarity in the area. There is also a need for a

¹⁵⁵⁶ Sauter (1998), page 38.

framework for balancing, to guide in times of doubt. Only once this is done can Community competition law legitimately claim to have come of age.

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ANNEX

1. TABLE 1

Year	Total Number of Article 81(3) Cases	Number of Article 81(3) Cases where:			
		Market Integration considered decisive		Other non- economic objectives considered decisive	
		Number	%	Number	%
1993	3	0	0	2	67
1994	11	0	0	5	45
1995	1	0	0	0	0
1996	5	3	60	1	20
1997	2	0	0	0	0
1998	3	0	0	0	0
1999	12	1	8	2	17
2000	3	0	0	1	33
2001	5	0	0	1	20
2002	3	0	0	0	0
2003	3	1	33	0	0
2004	2	0	0	0	0
Total	53	5	9.4%	12	23%

2. TABLE 2

Year	Total Cases ^a		Total Cases where Non-Economic Treaty Objectives Considered, but not Decisive ^b				Total Cases where Non-Economic Treaty Objectives Considered and Decisive			
	Case only has Article 81(1) Analysis	Case with Article 81(3) Analysis	Market Integration		Objectives Considered outside of Market Integration		Market Integration		Objectives Considered outside of Market Integration	
			Article 81(1)	Article 81(3)	Article 81(1)	Article 81(3)	Article 81(1)	Article 81(3)	Article 81(1)	Article 81(3)
1993	2 ^c	3 ^d	0	0	0		1 ^e	0	0	2 ^f
1994	6 ^g	11 ^h	0	0	0		3 ⁱ	0	0	5 ^k
1995	3 ^l	1 ^m	1 ⁿ	0	0		1 ^o	0	0	0
1996	4 ^p	5 ^q	0	0	1 ^r		2 ^t	3 ^u	0	1 ^v
1997	0	2 ^w	0	0	0		2 ^y	0	0	0
1998	4 ^z	3 ^{aa}	0	0	0		2 ^{bb}	0	0	0
1999	4 ^{cc}	12 ^{dd}	1 ^{ee}	0	0		2 ^{ff}	1 ^{gg}	0	2 ^{hh}
2000	7 ⁱⁱ	3 ^{jj}	0	0	0		3 ^{kk}	0	0	1 ^{mm}
2001	10 ⁿⁿ	5 ^{oo}	0	0	1 ^{pp}		5 ^{qq}	0	1 ^{rr}	1 ^{ss}
2002	8 ^{tt}	3 ^{uu}	0	1 ^{vv}	0		8 ^{xx}	0	0	0
2003	1 ^{yy}	3 ^{zz}	0	0	0		1 ^{aaa}	1 ^{bbb}	0	0
2004	3 ^{ccc}	2 ^{ddd}	0	0	0		1 ^{eee}	0	0	0
TOTAL	52	53	2	1	2	9	31	5	1	12

* Only formal Regulation 17 decisions reported in Official Journal are considered. We analyse all Commission decisions from 1993, until 1 May 2004.

^b There is a double-counting problem in relation to 1996, 1997, 2000, 2001 and 2002. This is because, sometimes, the same decision has considered more than one non-economic objective and one has been decisive and the other(s) have not. In these instances, we have included the case under *both* columns. We have *not* done the same in the Introduction itself. There, we have only listed each decision once. Where the same decision involved consideration of a 'decisive' objective as well as a 'non-decisive' one, we have listed it as a 'decisive' objective.

* Commission decisions, *CNSD*, OJ 1993 L203/27 and *Zera/ Montedison*, OJ 1993 L272/28.

^d Commission decisions, *ERU/Eurovision*, OJ 1993 L179/23; *Audiel*, OJ 1993 L206/50 (breached article 81(3) on indispensability and elimination of competition grounds, no balance conducted) and *Grundig's EC distribution system*, OJ 1994 L20/15.

^{ee} Commission decision, *Zera/ Montedison*, OJ 1993 L272/28 (market integration, paragraphs 98-113).

^f Commission decisions, *ERU/Eurovision*, OJ 1993 L179/23 (benefits to smaller members, and thus smaller countries, paragraphs 59 and 63, can show more of the event as can alternate between stations in a country, one station could not show all of the Olympics, paragraph 60, facilitates market integration, paragraph 61, funding of minority sports, paragraphs 62 and 63, cheaper production costs, paragraphs 63 and 65, better quality signal, paragraph 64) and *Grundig's EC distribution system*, OJ 1994 L20/15 (not in the decision, but consumer protection seems important, see Chapter Four).

^g Commission decisions, *PVC*, OJ 1994 L239/14; *Cartonboard*, OJ 1994 L243/1; *Cement*, OJ 1994 L343/1; *International Private Satellite Partners*, OJ 1994 L354/75; *Far Eastern Freight Conference*, OJ 1994 L378/17 and *Tetorn and Others*, OJ 1994 L378/45.

^h Commission decisions, *International Energy Agency*, OJ 1994 L68/35; *Stichting Baksteen*, OJ 1994 L131/15; *Exxon/ Shell*, OJ 1994 L144/20; *Bayer/ BP Chemicals*, OJ 1994 L174/34; *BT-MCI*, OJ 1994 L223/36; *Pasteur Mérieux-Merck*, OJ 1994 L309/1; *Olivetti-Digital*, OJ 1994 L309/24; *Fujitsu AMD Semiconductor*, OJ 1994 L341/66; *Asahi/ Saint-Gobain*, OJ 1994 L354/87; *Trans-Atlantic Agreement*, OJ 1994 L376/1 and *Philips-Osram*, OJ 1994 L378/37.

ⁱ Commission decisions, *Pasteur Mérieux-Merck*, OJ 1994 L309/1 (public health may have been a factor, paragraphs 84, 85, 87 and 88); *Asahi/ Saint-Gobain*, OJ 1994 L354/87 (safety was an issue, paragraph 24, as was industrial policy, paragraphs 10 and 25. Both of these could have been decisive but there are also economic efficiency arguments, which probably predominated, paragraph 24) and *Philips-Osram*, OJ 1994 L378/37 (probably motivated by economic efficiency, but environmental protection also important, paragraphs 25 and 26).

^j Commission decisions, *Fujitsu AMD Semiconductor*, OJ 1994 L341/66 (market integration probably decisive, paragraph 32, economic efficiency also important, paragraphs 33-36); *Cement*, OJ 1994 L343/1 and *Tetorn and Others*, OJ 1994 L378/45 (market integration, paragraphs 51-63).

^k Commission decisions, *International Energy Agency*, OJ 1994 L68/35 (continuity of energy supply); *Stichting Baksteen*, OJ 1994 L131/15 (industrial policy, seems to be the main motivation, paragraphs 18-26, also mentioned was that agreement allows for improved social conditions, including the redeployment of employees, paragraph 27); *Exxon/ Shell*, OJ 1994 L144/20 (industrial policy, probably the main reason, paragraph 67, also improves health and environment, paragraph 68 and economic efficiency, paragraph 69); *Bayer/ BP Chemicals*, OJ 1994 L174/34 (industrial policy, paragraph 6) and *BT-MCI*, OJ 1994 L223/36 (industrial policy probably the main reason, paragraph 53).

- ¹ Commission decisions, *Coapi*, OJ 1995 L122/37 (unclear whether they applied article 81(3) and found it was not fulfilled, but it seems as though no notification for an exemption was ever made, paragraph 41); *PMI-DSV*, OJ 1995 L221/34 and *BASF Lacke + Farben AG, and Accinauto SA*, OJ 1995 L272/16.
- ^m Commission decision, *Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven*, OJ 1995 L312/79.
- ⁿ Commission decision, *Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven*, OJ 1995 L312/79 (market integration was an additional factor, paragraph 26, but, the decision seems to have been adopted on economic efficiency/ freedom grounds, paragraphs 20-30).
- ^o Commission decision, *BASF Lacke + Farben AG, and Accinauto SA*, OJ 1995 L272/16 (market integration, paragraphs 89 and 90).
- ^p Commission decisions, *ADALAT*, OJ 1996 L201/1; *Iridium*, OJ 1997 L16/87; *Ferry Operators - Currency surcharges*, OJ 1997 L26/23 and *Novalliance/ Systemform*, OJ 1997 L47/11.
- ^q Commission decisions, *LII/ SAS*, OJ 1996 L54/28; *Fenex*, OJ 1996 L181/28; *Banque Nationale de Paris - Dresdner Bank*, OJ 1996 L188/37; *Atlas*, OJ 1996 L239/23 and *Pheonix/ GlobalOne*, OJ 1996 L239/57.
- ^r Commission decision, *Banque Nationale de Paris - Dresdner Bank*, OJ 1996 L188/37 (industrial policy probably carried some weight, paragraph 16).
- ^s Commission decisions, *Atlas*, OJ 1996 L239/23 (industrial policy had some influence, paragraph 50, but economic efficiency/ freedom were the main motivators, paragraphs 48-52) and *Pheonix/ GlobalOne*, OJ 1996 L239/57 (industrial policy probably had a mild influence, paragraphs 57 and 58).
- ^t Commission decisions, *ADALAT*, OJ 1996 L201/1 (market integration was decisive, paragraphs 189 and 190) and *Novalliance/ Systemform*, OJ 1997 L47/11 (market integration was decisive, paragraphs 54-60 and 62, were also price-fixing problems, paragraph 61).
- ^u Commission decisions, *Banque Nationale de Paris - Dresdner Bank*, OJ 1996 L188/37 (market integration was important and probably decisive for clearance, paragraph 18); *Atlas*, OJ 1996 L239/23 (market integration was decisive, paragraphs 38-40 and 43) and *Pheonix/ GlobalOne*, OJ 1996 L239/57 (market integration seems to have been one of the decisive factors, paragraphs 48, 52 and 54).
- ^v Commission decision, *LII/ SAS*, OJ 1996 L54/28 (although not evident from the decision the basis of this case seems to have been industrial policy, see Commission, *RCP 1996*, pages 120-121).
- ^w Commission decisions, *Unisource*, OJ 1997 L318/1 and *Uniwold*, OJ 1997 L318/24.
- ^x Commission decision, *Unisource*, OJ 1997 L318/1 (industrial policy and regional policy may have contributed to the exemption, paragraphs 86, although economic efficiency was probably the basis for the decision, paragraphs 87-89).
- ^y Commission decisions, *Unisource*, OJ 1997 L318/1 (market integration decisive, paragraphs 80 and 83) and *Uniwold*, OJ 1997 L318/24 (market integration one of the decisive points, paragraph 66).
- ^z Commission decisions, *VW*, OJ 1998 L124/60; *Pre-Insulated Pipe Cartel*, OJ 1999 L24/1; *British Sugar plc and Others*, OJ 1999 L76/1 and *Greek Ferries*, OJ 1999 L109/24.
- ^{aa} Commission decisions, *Van den Bergh Foods Limited*, OJ 1998 L246/1; *Sicasov*, OJ 1999 L4/27 and *Transatlantic Conference Agreement*, OJ 1999 L95/1.

- ^{bb} Commission decisions, *VW*, OJ 1998 L124/60 (market integration, paragraphs 130-145) and *Sicasov*, OJ 1999 L4/27 (market integration, paragraphs 62-64).
- ^{cc} Commission decisions, *Télécom Développement*, OJ 1999 L218/24; *Nederlandse Vereniging van Banken and Others*, OJ 1999 L271/28; *FiG and TU*, OJ 2000 L39/1 and *Seamless steel tubes*, OJ 2003 L140/1.
- ^{dd} Commission decisions, *Whitbread*, OJ 1999 L88/26; *TPS*, OJ 1999 L90/6; *EPI code of conduct*, OJ 1999 L106/14; *P&I Clubs*, OJ 1999 L125/12; *P&O Siena Line*, OJ 1999 L163/61; *Bass*, OJ 1999 L186/1; *Scottish and Newcastle*, OJ 1999 L186/28; *Europe Asia Trades Agreement*, OJ 1999 L193/23; *Cégétel+ 4*, OJ 1999 L218/14; *REIMS II*, OJ 1999 L275/17; *British Interactive Broadcasting/ Open*, OJ 1999 L312/1 and *GEAE/P&W*, OJ 2000 L58/16.
- ^{ee} Commission decision, *PEG and TU*, OJ 2000 L39/1 (market integration may have had some impact, paragraph 108, otherwise economic efficiency/ freedom prevails, paragraphs 103-122).
- ^{ff} Commission decisions, *Europe Asia Trades Agreement*, OJ 1999 L193/23 (market integration, paragraphs 49 and 50) and *Seamless steel tubes*, OJ 2003 L140/1 (market integration, paragraphs 101-104, there was another point that just raised economic efficiency/ freedom points, paragraphs 111- and 112, but this formed another head of claim).
- ^{gg} Commission decision, *REIMS II*, OJ 1999 L275/17 (improved market integration due to "...considerable improvements with regard to cross-border mail...", paragraphs 69-76).
- ^{hh} Commission decisions, *EPI code of conduct*, OJ 1999 L106/14 (the only reason given for exemption is to allow an orderly transition from a takeover from a system of virtually total prohibition on advertising and on the supply of unsolicited services, as currently exists, to one of total freedom, involves a significant transformation of the framework within which professional representatives operate. If this takeover is made suddenly, there is a potential risk of confusion in the mind of the public such as might damage the image that professional representatives give to institutions participating in the administration of justice, paragraph 46) and *GEAE/P&W*, OJ 2000 L58/16 (environmental protection may have had some influence, albeit minor, paragraph 79, the rest of the balance only discusses economic efficiency, paragraphs 79 and 80. However, the decisive part of this decision may well have been political. It was to develop an engine for Airbus and having a two engine choice would make the aircraft much more attractive to airlines, see, for example, paragraph 81 and Chapter Two).
- ⁱⁱ Commission decisions, *Inntrepreneur*, OJ 2000 L195/49; *Unisource*, OJ 2001 L52/30; *Nathan-Bricolux*, OJ 2001 L54/1; *Opel*, OJ 2001 L59/1; *Amino Acids*, OJ 2001 L152/24; *JCB*, OJ 2002 L69/1 and *Soda-ash - Solvay, CFFK*, OJ 2003 L10/1.
- ^{jj} Commission decisions, *Eurovision*, OJ 2000 L151/18; *CECED*, OJ 2000 L187/47 and *FETTCSA*, OJ 2000 L268/1.
- ^{kk} Commission decisions, *CECED*, OJ 2000 L187/47 (environmental protection was certainly an issue, paragraphs 47-57, but probably not decisive, see Chapter Four) and *Nathan-Bricolux*, OJ 2001 L54/1 (market integration seems to have been the fundamental motivation, paragraphs 72-85. Economic efficiency/ freedom was also important, paragraphs 86-90, it is possible that improving education also had a small part to play, paragraph 85, but this is very debatable).
- ^{ll} Commission decisions, *Nathan-Bricolux*, OJ 2001 L54/1 (market integration seems to have been the fundamental motivation, paragraphs 72-85. Economic efficiency/ freedom was also important, paragraphs 86-90, it is possible that improving education also had a small part to play, paragraph 85, but this is very debatable); *Opel*, OJ 2001 L59/1, paragraphs 118-135 and *JCB*, OJ 2002 L69/1, paragraphs 179-191.

- ^{mm} Commission decision, *Eurovision*, OJ 2000 L151/18 (benefits to smaller members, and thus smaller countries, paragraphs 85-87, can show more of the event as can alternate between stations in a country, one station could not show all of the Olympics, paragraph 88 and 89, cheaper production costs, paragraphs 86 (note that since 1993 no longer discussion of the better quality signal, aiding of minority sports, or market integration objectives)).
- ⁿⁿ Commission decisions, *UEFA's broadcasting regulations*, OJ 2001 L171/12; *Eco-Emballages*, OJ 2001 L233/37; *Identrus*, OJ 2001 L249/12; *Visa International*, OJ 2001 L293/24; *Citric Acid*, OJ 2002 L239/18; *Luxembourg Brewers*, OJ 2002 L253/21; *Vitamins*, OJ 2003 L6/1; *Bank charges for exchanging euro-zone currencies - Germany*, OJ 2003 L15/1; *Zinc phosphate*, OJ 2003 L153/1 and *PO/ Interbrew and Alken-Maes*, OJ 2003 L200/1.
- ^{oo} Commission decisions, *Volkswagen*, OJ 2001 L262/14; *SAS Maersk Air*, OJ 2001 L265/15; *Glaxo Wellcome and Others*, OJ 2001 L302/1; *DSD and Others*, OJ 2001 L319/1 and *Revised TACA*, OJ 2003 L26/53.
- ^{pp} Commission decision, *Eco-Emballages*, OJ 2001 L233/37 (there may be a hint of environmental protection being considered in paragraphs 80 and 81, the main reasons seem to be economic efficiency/ freedom though, paragraphs 73-86).
- ^{qq} Commission decisions, *Glaxo Wellcome and Others*, OJ 2001 L302/1 (market integration seems decisive, paragraphs 124 and 125 - note that this was decided under article 81(3), but there market integration arguments were not in evidence); *Luxembourg Brewers*, OJ 2002 L253/21, paragraphs 67-73 (although other factors considered too); *Vitamins*, OJ 2003 L6/1, paragraph 589; *Zinc phosphate*, OJ 2003 L153/1, paragraph 213 and *PO/ Interbrew and Alken-Maes*, OJ 2003 L200/1, paragraph 262.
- ^{rr} Commission decision, *DSD and Others*, OJ 2001 L319/1 (environmental protection may well have had a decisive effect on the Commission and how tolerant it was prepared to be of any potential restrictions in some area, paragraphs 110-116, but economic efficiency/ freedom seem the general basis of the decision, paragraphs 104-140).
- ^{ss} Commission decision, *DSD and Others*, OJ 2001 L319/1 (environmental protection seems clearly to have been the basis of the exemption, paragraphs 142-146, economic efficiency may have been an additional motivation for the Commission, paragraph 145).
- ^{tt} Commission decisions, *Graphite electrodes*, OJ 2002 L100/1; *Industrial and medical gases*, OJ 2003 L84/1; *Methionine*, OJ 2003 L255/1; *Omega - Nintendo*, OJ 2003 L255/33; *Mercedes-Benz*, OJ 2002 L257/1; *Methylglucamine*, OJ 2004 L38/18; *Austrian Banks - Lombard Club*, OJ 2004 L56/1 and *Food flavour enhancers*, OJ 2004 L75/1.
- ^{uu} Commission decisions, *AuA/ LII*, OJ 2002 L242/25; *Visa International - Multilateral Interchange Fee*, OJ 2002 L318/17 and *IFPI 'Simulcasting'*, OJ 2003 L107/58.
- ^{vv} Commission decision, *IFPI 'Simulcasting'*, OJ 2003 L107/58 (market integration - increasing it - might have contributed to the exemption, paragraph 90, although economic efficiency seems at the basis of the exemption, paragraphs 84-92).
- ^{ww} Commission decision, *AuA/ LII*, OJ 2002 L242/25, paragraph 86 (hints that economic and social cohesion, or even market integration, might have had some influence, not very much though as not considered in detail here).
- ^{xx} Commission decisions, *Graphite electrodes*, OJ 2002 L100/1, paragraphs 108-110; *AuA/ LII*, OJ 2002 L242/25, paragraphs 76-82; *Mercedes-Benz*, OJ 2002 L257/1; *Industrial and medical gases*, OJ 2003 L84/1, paragraphs 354 and 360; *Methionine*, OJ 2003 L255/1, paragraphs 213-215; *Omega - Nintendo*, OJ 2003 L255/33, paragraphs 331 and 332; *Methylglucamine*, OJ 2004 L38/18, paragraph 181 and *Food flavour enhancers*, OJ 2004 L75/1, paragraph 172.

^{yv} Commission decision, *French beef*, OJ 2003 L209/12.

^{zz} Commission decisions, *UK Network Sharing Agreement*, OJ 2003 L200/59; *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L291/25 and *REIMS II renotification*, OJ 2004 L56/76.

^{aaa} Commission decision, *French beef*, OJ 2003 L209/12, paragraph 126.

^{bbb} Commission decision, *REIMS II renotification*, OJ 2004 L56/76 (improved market integration due to "...considerable improvements with regard to cross-border mail...", paragraphs 111-117).

^{ccc} Commission decisions, *Carbonless paper*, OJ 2004 L115/1; *Electrical and mechanical carbon and graphite products*, OJ 2004 L125/45 and *Industrial tubes*, OJ 2004 L125/50.

^{ddd} Commission decisions, *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag*, OJ 2004 L75/32 and *ARGE//ARO*, OJ 2004 L75/59.

^{eee} Commission decision, *Carbonless paper*, OJ 2004 L115/1, paragraph 334.

